Supreme Court of the United States.

OCTOBER TERM, 1875.

THOMAS SHERLOCK, ET AL.

vs.

CHARLES ALLING, Administrator, &c.

No. 212.

Error to the Supreme Court of Indiana.

LINCOLN, SMITH & STEPHENS,

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STATEMENT OF THE CASE.

This was a suit brought by the defendants in error in the court of common pleas of Switzerland county, Indiana, to recover $5,000 of the defendants for causing the death of Otis B. Sappington, by want of due care on the part of their agents.

The suit was brought under a statute of that State providing for a recovery for death caused by want of such care.

The petition sets out that the defendants below, the plaintiffs here, were owners of a line of Steamboats navigating the Ohio river, between the port and city of Cincinnati, in the State of Ohio, and the port of the city of Louisville, in the State of Kentucky, and were then owning, running, and navigating said line of steamboats between said ports, for the avowed purpose of carrying passengers, freights, and the

United States mail; that the said Sappington took passage on the defendants' steamboat, "United States," at Cincinnati, Ohio, to be carried from thence to the port of Madison, Indiana: that the master, pilot, and officers and employees of said boat, so carelessly and negligently navigated said boat, that she collided with and against the defendants' steamboat America, which the defendants were navigating from Louisville, Kentucky, to Cincinnati, Ohio; that the boats thereupon caught fire and burnt up; that said Sappington, being a resident of Madison, Indiana, was, without his fault, suffocated and burnt to death; that the pilots of the said boats were careless in not obeying the pilot rules established by the supervising inspectors under the act of Congress of August 30, 1852; that the pilot of the United States, the descending boat, blew the first signal, and that this caused a misunderstanding of whistles, &c., &c.

The defendants in their answer set up that the carelessness that led to the collision, if any there was, took place while the boats were navigating the Ohio, outside of, and beyond low water mark, measured from the Indiana shore, and within the State of Kentucky; that the State of Kentucky had passed a special act, giving damages for death caused by carelessness, which was in full force at the time, and fixed the rights of the parties for such want of care, and which limited the right to one year; they also answered that these boats were carrying on commerce under the laws of the United States, relating to the coasting trade and fisheries, and under those relating to the better security of the lives of passengers upon vessels propelled in whole or in part by steam, and those relating to tonnage and hospital dues, that they were

The code of Indiana requires all affirmative facts to be specially pleaded. (*Hubler* v. *Patten*, 9 Ind., 275; *Baker* v. *Kistler*, 13 Ind., 64; *Walrod* v. *Bennett*, 6 Barb., 145.)

The facts relied upon by the plaintiff to make out his case were, 1st: that the descending boat, the United States, on which Sappington was a passenger, blew the first whistle contrary, as was claimed, to Rule I, passed by the supervising inspector, (*Rec.*, *pp.* 4, 10,) whereby there was a confusion of signals; and, 2d: the carrying of coal oil. (*Rec.*, *p.* 9.)

Rule I of the inspectors was passed in obedience to the requirements of section 29 of the law of Congress of 1852, (10 *Stat. at L. p.* 72,) and is in these words:

"RULE I. When steamers are approaching each other the signals for passing shall be one sound of the steam whistle to keep to the right, and two sounds of the steam whistle to keep to the left. These signals first to be made by the ascending steamer. *If the dangers of navigation, darkness of the night, narrowness of the channel,* OR ANY OTHER CAUSE, *render it necessary for the descending boat to take the other side, she can do so by making the necessary signals, and the ascending steamer must govern herself accordingly.*" (*Rec.*, *pp.* 12 *and* 13.)

The pilots on the river had, by a long practice, construed this rule so as to give the descending pilots the right, indeed, to require of him, that he blow first, if, in his judgment, there was anything relating to the navigation of the boats to require it. (*Kelso's Ev.*, *Rec.*, *pp.* 75, 76; *McCammant's Ev.*, *Rec. p.* 133.)

On that night the wind blew the smoke and steam quartering up the river, and the pilot on the United States thought that the pilot on the America might be deceived as to their nearness to each other, and blew first.

It so happened that the America was blowing at the same time, and one of her whistles was not heard on the United States. This caused the misunderstanding of whistles that led to the collision.

The law of 1852 punished the pilot who disobeyed these rules thus:

"Should any pilot, engineer, mate, or master, neglect or willfully refuse to observe the foregoing regulations, any delinquents so neglecting shall be liable to a penalty of thirty dollars, (now increased to fifty,) and for all damage done to any passenger in his person or baggage by such neglect or refusal." (10 Stats. at Large, 72.)

This matter is therefore fully regulated by Congress. (*See also sec.* 30 *of the act of* 1852, *brief, pp.* 37, 38.) The carrying of coal oil is also provided for by Congress.

The act of July 25, 1866, had this provision as to coal oil:

"Nor shall coal oil or crude petroleum be hereafter carried except on the decks or guards thereof, or in open holds where a free circulation of air is secured, and at such distance from the furnaces or fires as may be prescribed by any supervising inspector or any board of local inspectors." (*Sec.* 5, *act of* 1866, 14 *Stat. at L.*, 228.)

The defendants had the required license and were carrying it in strict accordance with such license on the guard forward. (*Rec., p.* 179.)

I call the attention of the Court to this, as it shows two things of importance: first, that the acts complained of are those regulated by acts of Congress; and second, that they took place when the boats were running in the river and were some half mile apart. This is important as bearing on the special findings of the jury.

fully fitted up, manned and equipped, and being navigated under said laws, and that the State of Indiana could not impose this liability upon these defendants.

At the last term of the court a motion was made to dismiss the case for want of jurisdiction, which motion was overruled. It is still insisted upon that the court has no jurisdiction.

Among the defenses found in the answer were the following:

"2. And the defendants for further answer to the complaint filed against them by the plaintiffs, says: that the injury complained of in the said complaint occurred on the Ohio River, about two miles above Warsaw, in the State of Kentucky, and in a part of the river between the Kentucky shore and low water mark on the Indiana side of the river, and within the limits of the State of Kentucky. That by an act of March 10th, 1854, of the State of Kentucky, applicable to cases of this character, and which was in full force at the time of the alleged injury it was provided:

'That if the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representatives of the deceased shall have right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the life or destruction of the life aforesaid; and that the action under said act should be commenced within one year from the time of such death.'

That prior to the passage of said act, and aside from the provisions thereof, there was no liability whatever within the State of Kentucky for damages or loss resulting from such death, or for injuries resulting in death, and that there was no liability within the State of Kentucky for the cause of action

set up in said complaint, and the said defendants insist that they are not liable in this action, and specially do they insist upon the lapse of time as a bar to any action which might otherwise exist by the law of Kentucky, this action not being commenced within one year next after said alleged injury." *Rec. p.* 16.

The Statute of Kentucky referred to and quoted from, is in *Stanton's Rev. Stat., Vol. II., pp.* 510 *to* 512.

The plaintiff files two replies to this answer, one admitting that the carelessness and collision took place outside of low water mark, but setting up that the force of the collision turned the head of the United States towards the Indiana shore, and that the momentum of the boat carried her above low water mark where she sunk and burnt. *Rec. p.* 21. Another reply admits that the want of care and the collision took place between the centre thread of the stream and low water mark on the Indiana shore. *Rec.* 21, 22.

Demurrers were filed to these replies by the defendants, and they were overruled. *Rec.* 22, 23.

The *Third* defense is in these words:

3. "And the defendants, for further defense, say that they and each of them were, at the time of the said supposed injuries, citizens of the United States, and they always have been such; that their said steamers, United States and America, were built for them by citizens of the United States at Cincinnati, Ohio, and Louisville, Kentucky, and have ever since been owned by them. That at the time of said alleged injury, they were engaged with their steamboats in carrying on commerce among the several States bordering on the Ohio river between Cincinnati, in the State of Ohio, and Louisville, in the State of Kentucky, and that the said steamers were then

on a trip from Cincinnati to Louisville, and Louisville to Cincinnati, aforesaid; *that their said boats were engaged in such commerce, under the laws of the United States relating to the coasting trade and fisheries, and under the law of the United States for the better security of the lives of passengers on vessels propelled in whole or in part by steam, and under the law of the United States relating to tonnage and hospital dues; that said steamers were at the time engaged in such commerce, under a special license issued to each within one year from the time of said alleged injury by the United States Government, and said steamers were specially licensed and enrolled within one year of the time of said alleged injury by the Government, and had been regularly inspected within six months from the time of said injury, and that the said licenses, enrollments, and inspection papers were in full force at the time of said alleged injury; and that said steamers were carrying on said commerce under and by virtue of said license, enrollment, and inspection papers; that the said steamers had been and were built, fitted up, appareled, and equipped in all respects in accordance with said laws, and had regularly paid to the Government of the United States the tonnage and hospital dues, and all other dues required of such vessels under said laws*; that they were under the command of most prudent and skillful masters, and of competent and skillful officers and crews, and were in all respects river-worthy and fit to carry on successfully such commerce; *that they had the necessary pilots and engineers, and were at the time under the charge of said pilots, with the master and other necessary officers on watch;* [that the said supposed injury occurred on the Ohio river about two miles above Warsaw, in the State of Kentucky, and between the Kentucky shore and low-water mark, on the Indiana side of the river, and while said steamboat was being thus employed and navigated;] that neither of said defendants was on board of, or in any way engaged in the management of said boat; [nor were the said injuries in any way,

directly or indirectly, the result of the want of care of the said defendants or either of them.]" *Rec. pp.* 16, 17.

In relation to the third defense the court first struck out the parts in parenthesis, and then overruled the defense on demurrer. The court all through the case and especially in the charges asked and refused ruled that the facts striken out were wholly immaterial.

See charges 21, 22 *given at the request of the plaintiffs. Rec. p.* 235. *Also charges* 4, 5 & 6 *asked by the defendants, and refused Rec. p.* 238. *Also the general charge, Rec. pp.* 247, 248.

After these parts were striken out the court then overruled this defense on general demurrer. *Rec. pp.* 20, 21.

In reference to the 2nd defence above set out, the court ruled that the territorial limits of the state extended to low water mark, but that the State had concurrent jurisdiction over the river with Kentucky, and that if the neglect and want of care and death occurred on the river north of the centre thread thereof, and between the centre thread and the Indiana shore, that the defendants were liable, under this Indiana law.

The water at the time was at a high stage. *Remelein's Ev., Rec. p.* 101; and the court ruled that if the carelessness or wrongful act took place even over a low flat bar, that reaches out into the river and only gets dry at the very lowest water, that then it was in Indiana and the defendants were liable. To understand the view, which the court and jury took of this, the court is referred to charge No. 20 asked by the defendant and overruled, and the drawing contained therein. *Rec. p.* 240. They ruled in this respect, that the ordinary low water line was not the boundary line, but

the line of water on the shore and bars at the lowest stages. In the language of the charge "low water mark means the lowest point to which the river comes down in the lowest stages."

Charge 20 *given at the request of the plaintiffs. Rec. p.* 235. *And see in this connection charge* 20 *asked by the defendants and refused. Rec. p.* 240.

In relation to this point the jury were asked certain questions, and they answered them in reference to the collision, burning and death of Sappington. *Rec. p.* 255.

The statute makes the liability result from a wrongful act, which the court held in this case to mean negligence.

As the negligence is alleged to have been the improper blowing of whistles, and happened on the river some distance above and below the place of the first collision, and when the boats were in a different position relatively to the Indiana shore, and as the boats came together twice, once after the fire had commenced, and when they were endeavoring to get to shore to save the passengers and freight, these findings do not meet the case as will be shown further on.

II.

THE COURT HAS JURISDICTION OF THE CASE.

At the last term of this Court a motion was made to dismiss this case for the reason as alleged, that the Court had no jurisdiction of the cause. This motion was fully presented in printed briefs by both parties and was overruled. It cannot be necessary to say much upon this point now.

The answer sets up the statutes of the United States,

relating to the coasting trade and fisheries, those relating to the better security of the lives of passengers upon vessels propelled in whole or in part by steam, and those relating to tonnage and hospital dues, and averred that the steamer was an American vessel, fully fitted up, manned, equipped and running under said laws by virtue of special license and enrollment, authorizing it to carry on commerce among the states, had paid all its tonnage and hospital dues under said laws, and was at the time on a trip from Cincinnati, Ohio, to Louisville, Kentucky, and carrying freights, passengers and the United States Mail, and generally carrying on commerce among the states under said laws and by virtue of such licenses.

The "complaint" set out that the steamers were running upon the Ohio River between Cincinnati and Louisville, "for the avowed purpose of carrying passengers, freight and the United States Mail." *Rec. p. 6.* And this brought the steamers directly within the perview of the law of the United States, relating to the free use of this river and directly within the perview of the act admitting Indiana into the Union upon the basis of the provisions of the ordinance of July 13th, 1787, relating to the free navigation of the Ohio, &c., &c.

The defendants claimed that under the facts set up in their answer, this liability could not be created and imposed upon them; that it was a liability not before known, imposed by this statute, and that the defendants were protected from it by the laws referred to.

This clearly presented a federal question, giving this Court jurisdiction and requiring the Court to pass upon it.

The case also present other questions arising out of the laws of the United States, relating to the North Western Ter-

ritories, and to the compact between Virginia and Kentucky, as they apply to the Ohio River and its navigation or use.

That there was such question fairly made in the court below, and that it was decided against the plaintiff in error, will more fully appear as we proceed, and it is sufficiently set out in the record.

Crowell v. *Randell*, 10 *Pets.* 392, 298.
Armstrong v. *The Treasurer*, 16 *Pets.* 281.
Bride Proprietors v. *Hoboken*, 1 *Wall* 143.
Furman v. *Nichols*, 8 *Wall.* 56.

The rule upon this point is thus expressed in the two cases last named.

Thus in *Furman* v. *Nichols*, 8 Wall., 54, the Court say:

"If the record shows, either by express averment or by clear and necessary intendment, that the constitutional provision did arise, and that the court below could not reach the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the court was induced by it to make the judgment which it did." (8 Wall., 56.)

The same rule is thus expressed in the case of *Bridge Proprietors* v. *Hoboken:*

"But the true and rational rule is, that the court must be able to see clearly from the whole record that a certain provision of the Constitution, or act of Congress, was relied upon by the party who brings the writ of error, and that the right thus claimed by him is denied." (1 Wall., 143.)

These cases recognize the rule as stated by Mr. Justice Story, in *Crowell* v. *Randell.*

That learned judge in delivering the opinion of this Court in the case last named, uses the following language:

"And here the doctrine of the court has been, that it is not indispensable that it should appear on the record, in *totidem verbis*, or by direct and positive statement, that the question was made and the decision given by the court below on the very point; but that it is sufficient, if it is clear, from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." 10 *Pets.* 352.

It will be noted that the constitutional provision in reference to commerce among the States is set up in this third defense; that the statutes relating thereto are also referred to; and these acts are so familiar that no court could fail to comprehend the purpose of this plea. And the facts bringing these boats and the case within these acts are carefully set out. These facts show boats built, owned and equipped, officered, and running under these laws, and under the permission granted thereby, and a defense based upon them. Surely I need not set out the volume and page of these laws or their title more fully. It is perfectly clear in this whole record that the parties and court were by this third plea, and by the charge 24 asked, clearly put in possession of the defense under these laws and of the invalidity of the act of Indiana, as against these defendants, under the constitution and laws of the United States, and that the defendants below claimed the

right and privilege under these laws to carry on this commerce free and exempt from this liability.

And the opinion of the Supreme Court of Indiana (made part of the record by the practice of that State), shows most clearly that they understood that this question was in the case, and that it was necessary for them to pass upon it. This opinion is proper to be referred to under the act of Feb. 5th, 1867. *Murdock* v. *City of Memphis*, 20 Wall. 633, 634.

The court admits that the liability is a new one created by this act of Indiana, and that it applies to vessels owned and engaged as the vessels in question were, and conclude upon this point, as follows:

"We are unable to see how it can in any manner interfere with, or tend to regulate, commerce among the States, or hinder or obstruct the free use of a license granted under an act of Congress, when prosecuted against the owners of a steamboat engaged in such commerce under such licenses." *Record* 266, 267.

Further on they say:

"We are of the opinion that the law applies to cases where death is caused by the wrongful act or omission on vessels, while navigating the Ohio river under license under the acts of Congress, by the owners, or their agents, officers, and servants in charge of such vessel; that it is not invalid as tending to regulate commerce among the States, or as hindering or obstructing the free use of a license under which such owners may be navigating the river." *Rec. pp.* 268, 269.

What we claimed was, that this act imposed a new and

heavy liability upon the owners of these boats, and was therefore an imposition of a liability upon this commerce.

For anything further upon this point, we refer to the briefs before the Court at the last term.

III.

THE ACT IN QUESTION WAS AN IMPOSITION OF A NEW AND HEAVY LIABILITY UPON THIS REGULATED AND LICENSED COMMERCE AMONG THE STATES.

FIRST.

The act of Indiana created a new liability.

The act of Indiana, under which the suit was brought, was in these words:

"When the death of any one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must insure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." (2 *Gavin & Hord Stat., p.* 330.)

It will be observed that the amount recovered is not assets. It goes exclusively to the widow and children or next of kin, and the creditors have no share of it.

1st. It is therefore a new cause of action not known to the common law.

Jeffersonville **R. R. Co.** v. *Swayne, Ad.*, 26 *Ind.*, 484, 485, 486.

Eden v. *Lex. and* **W. R. R. Co.**, 14 *B. Mon.*, 205, 206.

Campbell v. *Rogers*, 2 *Handy*, 114.

Worley v. **C.**, *H. & D.* **R. R. Co.**, 1 *Handy*, 481, 491.

Pennsylvania R. R. Co. v. *Henderson*, 51 *Penn. St. R.*, 322.

Carey v. *Berk. R. R. Co.*, 1 *Cush.*, 479.

Glaholm v. *Baker*, 34 *Beav.*, 308, 309.

Whitford v. *Panama R. R. Co.*, 3 *Bos.*, 84.

Safford v. *Drew*, 3 *Duer.*, 633.

Whitford v. *The Panama R. R. Co.*, 23 *N. Y. R.*, 468, 469.

Woodard v. *M., S., & N. I. R. R. Co.*, 10 *Ohio St.*, 123.

Blake v. *Midland R. R.*, 18 *Ad. & El. N. S.* 110, 111.

This rule is well expressed in the case of *Whitford* v. *The Panama R. R. Co.* He says:

"These statutes have introduced a principle wholly unknown in common law, namely, that the value of a man's life to his wife or next of kin, constitutes, with a certain limitation as to amount, a part of his estate which he leaves behind him, to be administered by his personal representatives. The contrary doctrine, to-wit: that a cause of action existing for such a wrong in favor of the party injured, dies with him, and forms no part of the succession to which his wife and kindred are entitled, was so well established as to form one of the standard maxims of the law. (*Broom's Legal Maxims, p.* 400.) Besides, by the general principle of the law of England and of this country, the personal estate of a deceased person, distrib-

utable to his widow and next of kin, consists only of the residue remaining after the payment of his debts. In other words, the creditors are the primary claimants of the succession, and the executor or administrator represents their interests. But under these statutes the creditors are passed by, and the whole of the proceeds of the recovery goes to the surviving relatives. Again, although the action can be maintained only in the cases in which it could have been brought by the deceased, if he had survived, the damages, nevertheless, are given upon different principles, and for different causes." 23 *New York, pp.* 468, 469.

It is so held by the Supreme Court in this very case, (see *Record* 268,) and had been previously so determined in Indiana.

Sherlock v. *Alling Adm.* 44 *Ind.*, 197.

Jeffersonville R.R. Co. v. *Swayne's Ad.*, 26 *Ind.*, 485, 486.

2d. *No such cause of action existed in the admiralty.*

Crapo v. *Allen*, 1 Sprague's Dec., 185.

Benedict's Admiralty Jur., 2d ed., sec. 309.

Dunlap's Admiralty, 65.

Thomas's Adm. v. *Sherlock*, Judge Leavitt's Dec.

Plummer v. *Webb*, 1 Ware, 73–75.

There is very little to be found in the admiralty books upon this point, for the reason that no such claim has ever been asserted, and this circumstance is of great weight against any such right; but the principles laid down in the best authors, forbid a recovery for such a claim. Thus Mr. Benedict says:

"But causes of action for mere personal torts, are not regarded in admiralty as surviving the death of the person

injured, *and a state statute will not enable an administrator to maintain an action for such tort committed on the high seas.*" *Benedict Ad. Jr., Ed. of* 1870, *sec.* 309.

Mr. Dunlap says:

"Actions for injuries to the person do not survive to or against the representatives of either party." *Dunlap Ad. Pr., p.* 97.

In Cross Ad. v. *Allen,* Judge Sprague says:

"The causes of action set forth are maratime, and over them the admiralty has undoubted jurisdiction so far as they are mere torts, the right of action by the general maratime law die with the person injured." 1 Sprague's R. 185.

In reference to this point I have carefully examined the laws of the Rhodians, the laws of Wisbuy, and the laws of the Hansetowns, and the Ancient Sea Laws of Northern France, found in an old book entitled, 'A general Treatise of the Dominion of the Sea, and a complete body of the Sea Laws,' published many years ago in England, and I find that they generally provide for building contracts and other causes not admitted by the Supreme Court of the United States, as causes of admiralty. But they nowhere provide for this. The laws of Oleron and the English Admiralty provide for criminal jurisdiction, and they punish murder and other crimes, but they nowhere provide for damages for injuries causing death. And in our admiralty jurisdiction, actions in personam against the guilty party for personal injuries as assault and battery are of frequent occurrence, but no action for death is found. Nor has it any criminal jurisdiction. And in the Supreme Court, rules adopted on the 22nd of August, 1844, understood to have

been drawn by Judge Story, though the action for assault is recognized, yet no provision for or recognition of any action for death is found.

3d. There has been a class of cases where a husband or father has recovered for loss of services of a wife or child, where death has deprived them of such services. Such were the following:

James v. *Cristy*, 18 Mo., 164.
Plummer v. *Webb*, Ware 74, 75.
Chamberlin v. *Chandler*, 3 Mas., 245.
Hinor v. *The Sea Gull*, 2 Law Times, 15.
Ford v. *Monroe*, 20 Wend., 210.

The recovery in this class of cases proceed upon the idea that such service is due the husband or father.

But as to *Ford* v. *Monroe*, that is not deemed good law in New York.

Green v. *Hudson R. R. Co.*, 28 Barb., 9.
Pack v. *Mayor of New York*, 3 Coms., 493.

4th. That no such cause of action ever existed at common law or in admiralty is evident enough.

The occasions for asserting such an action have been so numerous for the last two hundred years, that, if it had existed, there would have been hundreds of cases asserting it; and yet none can be found. This is very strong evidence that no such right existed.

Costigan v. *Mohawk and Hudson R. R. Co.*, 2 Denio, 613.

DeCaux v. *Eden*, 2 Doug., 601.
Duke of Newcastle v. *Clark*, 8 Taunt, 621.
Russell v. *The Men of Devon*, 2 Tenn. R., 673.

Pasley v. *Freeman*, 3 Term. R., 62–3.
Carey v. *Berkshire R. R. Co.*, 1 Cush., 478.

In *Carey* v. *Berkshire R. R. Co.*, 1 Cush., 478, the court says:

"If these actions, or either of them, can be maintained, it must be upon some established principle of the common law. And we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in very many instances. At the least, we might expect to find the principle stated in some approved authority. None such was cited by counsel, and we can find none. This is very strong evidence, though not conclusive, that such actions cannot be supported."

And Supreme Court of Indiana so treat the action in this case. Speaking of the statute in question, they say:

"It gives a right of action where none existed before. The right of action in favor of the person killed died with him. No action could be maintained, for the death of another unconnected with the loss of services, before the law. The right of action, which the deceased had at his death is not by the law transferred to his representatives, *but it gives to them a totally new one on different principles.*" (*Rec. p.* 268.)

SECOND.

No State can impose such a liability upon vessels engaged as those in question were.

This being a new liability imposed upon these defendants by this statute of Indiana, the question arises whether it could hold as against them if the facts set up in the third paragraph

of the defense be proved; whether the laws of the United States set out in said defense, and the licenses issued thereunder, and the other laws referred to did not protect them from such liability; in other words, whether, under these laws and the authority of the licenses issued thereunder, the defendants were not privileged to run their vessels free from any such liability imposed by the statute of Indiana.

There is no reported case that I find where such a question as is here presented has been determined, except the case now in review, There are cases where actions have been brought in the state courts under state laws, for damages arising for a wrongful act causing death, but none that I know of raising the question presented in this case. The learned counsel have cited the following cases:

Rail Road Co. v. *Banon*, 5 Wall., 104.
Rail Road Co. v. *Whitton*, 13 Wall., 273.
Steamboat Co. v. *Chase*, 16 Wall., 526.
Chicago v. *Major*, 18 Ill., 356,
Penn. R. R. Co. v. *McClosky*, 23 Penn., 526.
Mahler v. *N. T. Co.*, 35 N. *Y.* R., 352.
Booth v. *Hubbard*, 8 Ohio St. R., 243.

In no one of these cases was any such question involved or presented.

In *Rail Road Co.* v. *Barron*, *Rail Road Co.* v. *Whitton*, *Rail Road Co.* v. *McClosky*, the cases were brought in the State Courts under statutes providing for pecuniary liability for death caused by the several rail road companies, and no such questions could be raised in either of these suits.

In *Mohler* v. *N. Tr. Co.*, it did not appear how the sloop was engaged, or whether she was an American vessel;

whether she was licensed and enrolled; whether she was wholly engaged in the internal commerce of the state or not. She may have been a sloop simply carrying the rubbish and accumulated filth from the city.

And the steamer may have been engaged in towing wholly within the State. The only question raised in the case was: whether the injury happened in the State of New York. The Supreme Court in General Term decided that it did not, and consequently dismissed the suit. The injury occurred in Long Island Sound, about a mile from Long Island Shore, and the sloop at the time was on a trip from City Island to North Port Long Island. The accident happened in the immediate vicinity of the shore, and very near Long Island. The Court of Appeals reversed the judgment, and held that the injury occured within the state.

There was no suggestions or facts pleaded relative to the character of the business of the vessel or whether she was A merican in character, or was licensed or enrolled, or in any way entitled to the protection of the constitution and laws of the United States, relating to commerce among Foreign Nations and the States. No such question seems to have been suggested.

All that is here said of the last mentioned case is true of the case of *Booth* v. *Hubbard*. This suit was brought for an injury resulting in death in putting off a passenger on the shore. The boat being at the shore, it was claimed that she was within Ohio. The defendants claimed that the injury happened in Virginia and not in Ohio. The only question was, one relating to the boundary line of the State. The court below held that the line of the States was the "ordinary

or common low water mark," precisely what the defendants claimed in this case.

The case of *Chicago* v. *Major* was a suit against the City for the death of a child, that fell into a water tank built by the City, and there was no question in any way connected with commerce.

The case of *Steamboat Co.* v. *Chase*, is much relied on. This was a suit brought in the State Court against the owners of a steamer, running between Providence and Newport, both within the same state. She was at the time within the State of Rhode Island.

That case presented the question simply, whether, because there was admiralty jurisdiction at the place and over the vessel, that ousted this statutory proceeding. No other question was made.

I have carefully examined the record and briefs of that case, and there is no allusion to any such question as that involved in this case, and nothing in the record on which to found it. It does not appear that the steamer was carrying on commerce among the States, that she was well manned and equipped under the laws pleaded herein, or was licensed and enrolled; and there is no allusion to any laws of Congress, and no facts set up to raise any such question, and it is nowhere suggested, even in the briefs of counsel in that case.

So that the case cannot be held to be an authority against the plaintiffs in error here.

The case did not show what the law of Rhode Island before the passage of the act was, or that the act imposed a new liability upon the owners of the steamer, for the acts of those who were solely related to them, as carrying on commerce among the States.

THIRD.

The cases decided by this Court are inconsistent with the decision of the Court below.

The liability imposed by this statute of Indiana and that of Kentucky hereafter to be named, if enforced might have exceeded more than $1,000,000. It is a new liability added to those before known, by this statute of Indiana, inconsistent with the rules and principles established by the cases determined by this Court.

It is evident that if the States could add one liability to those provided for by the common law and the maritime law, to parties navigating their vessels under the Laws of the United States, they could add another and another, and might so burden commerce that it could not be carried on. They could wholly destroy the system established by Congress.

It has been repeatedly decided by this Court that the states can not add liability to, or place burdens upon such commerce.

The Passenger Cases, 7 *How.* 445.
Hays v. *The Pacific Mail St. Ship Co.*, 17 *How.* 599.
Pennsylvania v. *The W. & B. Br. Co.*, 13 *How.* 566.
Sinnot v. *Davenport*, 22 *How.* 240.
Foster et. al. v. *Davenport*, 22 *How.* 245.
Steam Ship Co. v. *Port Wardens*, 6 *Wall.* 33.
The State Tonnage Cases. 12 *Wal.* 215.

Walton v. *State of Missouri, decided at the present term of this Court.*

A short reference to some of these cases will be profitable in this discussion.

The case of *Hays* v. *The Pacific Mail St. Ship Co.*, 17 How., 599, related to a tax which the State of California had imposed upon the vessels of the Pacific Steam Ship company.

These vessels were running from Panama to San Francisco. The principal office of the company was in New York, but for the better transaction of business, they had agencies in San Francisco, New Grenada and Panama. They also had a naval dock and ship yard at Benicia, California, though the stockholders resided in New York. The law of California levied a small tax upon these vessels, the same as upon other personal property in the state, which was paid, and suit was brought to recover it back.

After referring to the law of Dec. 31, 1792, relating to the registry of vessels. and to the act of July 29, 1850, as acts affecting such vessels, the court says:

"These ships are engaged in the transportation of passengers, merchandise. etc., between the City of New York and San Francisco, by the way of Panama, and between San Francisco, and different points in the Territory of Oregon. They are thus engaged in the business and commerce of the country, upon the highway of nations, touching at such ports and places as these great interests demand, and which hold out to the owners sufficient inducements by the profits realized or expected to be realized. And so far as respects the ports and harbors within the United States, they are entered and cargoes discharged or laden on board independently of any other control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the Constitution and general government, to which belongs the regulation of commerce with foreign nations and between the states."—pp. 598, 599.

In the case last named, the business and property of the party taxed was in California, and that state claimed the right to tax it with other personal property therein. Was it not a more plausible claim than the right to impose the liability in question?

If the State of Indiana can impose the liability in question, could she not impose a tax upon these boats, regardless of the place where they were owned? An ordinary tax would be much the lighter burden.

Again; look at the *Passenger Cases*, 7 How. 445.

These were cases relating to the laws of New York and Massachusetts. The law of New York imposed upon the captain $1.50 for each cabin passenger, and $1.00 for each steerage passenger if the voyage was from a foreign port. And if the vessel was a coasting vessel, twenty-five cents for each passenger. This money was called hospital money, and the law authorized the captain to recover the same from the passengers.

The law of Massachusetts authorized an examination of the passengers, and if any were lunatic, idiot, maimed, aged and infirm, or incompetent to maintain themselves, then that they should not land until a bond was given that such passenger should not be thrown upon the city or town for support. It also provided that no alien passenger should land until the master, or some one for the vessel, should pay $2.00 for each alien passenger landed.

These acts only related to the landing of foreigners in those states, and they were passed to prevent pauperism, and the paupers of Europe from being thrown among them for support, and not with any intent to regulate commerce.

And yet it was held that they were impositions upon that commerce, and invalid.

Now, they were much less impositions upon such commerce than is the statute of Indiana, and much less regulation of that commerce which is exclusively placed under the control of the general government.

The case of *Sinnot* v. *Davenport*, 22 How. 240, was one that brought in review a law of Alabama, which enacted that the owner of any steamboat navigating the waters of the state, before such boat should leave the port of Mobile, should file in the office of probate judge a statement in writing, setting out the name of the steamer and her owner or owners, his or their places of residence, and their interest therein, which statement should be signed and sworn to by the owners or their agents or attorney, and which statement should be recorded by the said judge of probate; and in case of the sale of the said boat, it was made the duty of the vendee to file a statement of the change of owners, his place of residence, and the interest transferred, and which should be signed by the vendor and vendee, and recorded; and it interposed a fine for a neglect to comply with these provisions.

The steamer Bagaby was running from New Orleans to Montgomery and Wetumpka on the Alabama river, above Mobile, touching at the latter city. Her owners were sued by the commissioners of pilots of the harbor of Mobile, for neglect to comply with the said law, and the question was presented to this Court. The Court held the statute void. Among other things the Court say:

"On looking into the act of Congress regulating to the coasting trade, it will be found that many conditions are to be

complied with by the owners of vessels, before the granting of the enrollment or license."

After naming some of these conditions, the Court proceed:

"These are the guards and restraints, and the only guards and restraints, which Congress has seen fit to annex to the privileges of ships and vessels engaged in the coasting trade, and upon a compliance with which, as we have seen, as full and complete authority is conferred by the license to carry on the trade as Congress is capable of conferring:"

"Now, the act of the legislature of the State of Alabama imposes another and an additional condition to the privilege of carrying on this trade within the waters, namely: the filing of a statement in writing, in the office of the probate judge of Mobile county, setting forth; 1. The name of the vessel. 2. The name of the owner or owners. 3. His or their place or places of residence; and 4. The interest each has in the vessel."

* * * * * *

"If the interpretation of the court as to the force and effect of the privileges afforded to the vessel by the enrollment and license in the case of *Gibbons* v. *Ogden* is to be maintained, it can require no argument to show a direct conflict between this act of the State and the act of Congress regulating this trade. Certainly, if this State law can be upheld, the full enjoyment of the right to carry on the coasting trade, as heretofore adjudged by this court, under the enrollment and license, is denied to the vessel in question."

Now, it was a very slight imposition put on commerce by this act of Alabama, compared with that by the law of Indiana. It will be observed that this provision was not enacted as a regulation of commerce, but to provide a record of the owners

of these vessels that the persons contracting with and trusting them might know with whom they dealt, and be able to collect their dues.

In the case of the *Steamship Co.* v. *Port Wardens*, 6 Wall. 33, was one in which a law of Louisiana came in review. This law, under the guise of regulating the fees of port wardens, provided that every vessel which arrived at the port of New Orleans should pay the port wardens five dollars, whether they performed any duty or not. Five dollars was demanded of the Steamship Company for their ship Charles Morgan, and being refused, a judgment for the same was rendered before a magistrate, which being affirmed by the Supreme Court of Louisiana, came to this court. The Court held the law of Louisiana unconstitutional and void, as being a regulation of commerce and a burden imposed on such commerce.

They say:

"That the act of the Legislature of Louisiana is a regulation of commerce, can hardly be doubted. It imposes a tax upon every ship entering the port of New Orleans, to be collected upon every entry. In case of a steamer applying between that port and ports in adjoining States of Alabama or Texas, it becomes a serious burden, and works the very mischief against which the Constitution intended to protect commerce among the States."

Now this act purported to be a police regulation of the port of New Orleans, and not a regulation of commerce; but as an imposition upon such commerce, was held to be a regulation, and therefore void. This also was a very small imposition upon such commerce compared with that in question.

There were some eighty persons killed by the disaster to

these boats, for which the owners were no more to blame than any other person, and this liability under the Indiana law is $5,000, to each person and by the Kentucky law is unlimited. In some of these suits pending in Kentucky the damages are laid at $30,000, and in none of them at less than $10,000.

Sundry cases called *The State Tonnage Cases* have been decided by this Court, and are reported in 12 *Wall.* 215. They refer to and adopt the cases above cited. In those cases a law of Alabama came in review. This law levied a tax of one dollar per ton upon some steamers running wholly within the waters of that State. They were licensed and enrolled. The Court held the tax void, and it having been paid under protest, authorized its recovery. It is true that the tax here was called a tonnage duty. But it was not distinctly upon that ground alone that the recovery was had. The Court refers to the cases above cited, where the laws neither purported to be tonnage dues, nor regulations of commerce.

These cases, and various others that might be cited, show that this Court, in reviewing the State laws, look not at the avowed purpose of the statutes, but to the effect thereof; and they show how careful this Court has been to protect the commerce of the country from impositions, or interference by and through State legislation. The statute of Indiana, as applied to these defendants, is a regulation of the relations existing between the owners of the boats engaged in commerce among the States, and is said to be an attempt to protect passengers carried by them, and others, who may be injured by the wrongful acts of the agents managing such boats, and defended upon that ground solely. It creates a new liability of most onerous character, and punishes the owners in the way of damages, for

acts which they did not authorize, and for which they were not otherwise liable by law. Of this there is no controversy. *The Jeffersonville R. R. Co.* v. *Swayne, Adm'r,* 26 Ind. 484. *Sherlock* v. *Alleyn, Adm'r.* 44 Ind. 147.

This law as applied to these defendants is not an act relating to contracts made within the state, or to business done within the State, or to boats or vessels owned in the State, but is equally applicable in its terms to vessels passing along the border line of Indiana going from Cincinnati, and points above, to St. Louis or New Orleans.

Suppose such to have been the case, would it not at once strike every one as beyond the power of the State?

It is evident that the State of Indiana has as much power over the case last put, as over the one presented, for both are equally commerce among the States. This statute is, therefore, in effect, a regulation of that commerce, and of the relationship existing between those who are engaged in carrying it on, and those whom they carry, or for whom they carry, or who may be injured thereby, of most grave and important character, imposing immense liabilities upon parties engaged in this commerce, for which they are not in law otherwise bound. This is the effect and force of the statute, unless the same is limited to the railroads and other persons and things, not being upon the navigable rivers engaged as these defendants were, in commerce among the States.

In this connection I also refer the Court to the following cases:

Brown v. *Maryland,* 12 *Wheat.* 446.
Almy v. *State of California,* 24 *How.* 173.
Crandall v. *State of Nevada,* 6 *Wall.* 43.
Walton v. *The State of Missouri.*

In the case of *Brown* v. *Maryland*, the Statute of Maryland came under the review of this Court. This statute was passed for the purpose of raising a revenue; and it required, among other things, that all importers of certain foreign merchandise, and others selling the same at wholesale, before they should be authorized to sell the same, should take out a license, for which they should pay fifty dollars, and in case they neglected so to do, imposed a penalty of one hundred dollars. This statute imposed a very light burden upon commerce compared with the statute in question; yet this Court held it void, as being inconsistent with the exclusive power Congress had over foreign commerce and commerce among the States.

The same may be said in relation to the case of *Almy* v. *The State of California*. That State had passed a law for the purpose of raising a revenue. The law imposed a tax on certain instruments of writing, and among them a small stamp tax on bills of lading for the transportation from any point or place in that State, to any point or place without the State, of gold or silver coin, in whole or in part, gold dust, or gold or silver in bars or in other forms; and imposed a fine of a hundred dollars for the breach of such law. The law was held to be unconstitutional by this Court.

In the case of *Crandell* v. *The State of Nevada*, a law of the latter State came in review. It imposed a capitation tax of one dollar upon every person leaving the state by any railroad, stage coach, or other vehicle engaged in transportating passengers for hire. This law was also imposed for the purpose of raising a revenue; and although there was no act of Congress existing which affected the matter in any way, the Court held this law unconstitutional.

The case of *Walton* v. *The State of Missouri,* decided by this Court at its present term is to the same effect. That case was so recently decided that it is unnecessary to recall the facts to the attention of the Court.

The statute of Kentucky (see page 3,) authorizes the recovery of *punitive* damages against these owners who had nothing personally to do with the injury, or in bringing it about, and who had built the best vessels ever run upon the Western waters, had entirely fitted them up under these laws, without regard to expense, and had employed the best officers and crews that could be employed. The owners who were not on board these vessels, or connected with their management at the time, have not only this liability imposed upon them for carrying passengers from state to state, but by this law of Kentucky are to be punished with *punitive* damages, damages never applied in any case in law except in punishment for malice and ill-will, and necessarily applied to the parties guilty of such malice. These facts are shown in this record. If the damages which are imposed upon the owners by this law were limited as they generally are under such acts to $5,000 to each person, they would amount to over $400,000; but when they are unlimited and punitive damages may be recovered, there is hardly any limit. It is evident if the States of Indiana and Kentucky can add this liability to vessels engaged in this commerce, under the protection of these laws, that there is no end to the imposition which they may impose.

And could there be a greater evidence of the importance of placing this commerce and such vessels under the exclusive control of the United States, than these conflicting laws and controversies?

FOURTH.

The power to regulate commerce or impose burdens upon it is exclusive in Congress

It was once a much mooted point whether the power to regulate commerce among the States was exclusively vested in Congress or not. In the earlier cases it was so understood

Gibbons v. *Ogden*, 9 *Wheat*, 198.
Brown v. *Maryland*, 12 *Wheat*, 440.
Haldeman v. *Beckwith*, 4 *McLean*, 286.
Kellogg v. *The State*, 12 *Conn.*, 24.
The People v. *The Saratoga R. R. Co.*, 15 *Wend*, 131.
Norris v. *Boston*. 4 *Met.*, 293, 295.
Perry v. *Torrence*, 8 *Ohio*, 523.
Steamboat Co. v. *Livingston*, 1 *Hopk.*, 154.
Same v. *Same*, 3 *Cow.*, 729.
Corfield v. *Coryell*, 4 *Wash.*, 381.
Golden v. *Prince*, 3 *Wash.*, 321.

But, for a time this position came to be questioned by some of the Judges in this Court. See the *Passenger Cases*.

In the case of *Haldeman* v. *Beckwith*, among the eight judges who sat at the argument (Mr. Justice McKinley not being present), the Court were equally divided upon this point, and the judgment of the Court below was affirmed. No report of the case was made, because the Court could make no decision This I know, as I was connected with the case for the defendants in error. If Mr. Justice McKinley had been present the Court would have been five in favor of

the exclusiveness of this power in Congress against four. See his opinion in the *Passenger Cases*, 7 How. 454, 455.

The decision of this case by Mr. Justice McLean will be found in 4 *McLean* 299.

But this question was put at rest in the case of *Cooley* v. *The Phil. Wardens*, 12 How. 299, where it was held that:

"The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusive in Congress in the former, but not so in the latter class."

Among this latter class were inspection and quarantine laws, pilot and port laws, the regulation of ferries, bridges, etc., all of a purely local character.

But in relation to all matters which provide for the liabilities of owners carrying on this commerce, which are not of a purely local character, there the power is held to be exclusive.

This decision has since frequently been affirmed, or treated by this Court as a final settlement of the law upon the subject.

Gillman v. *Philadelphia*, 3 *Wal.*, 727.
Crandall v. *State of Nevada*, 6 *Wal.*, 42.
Steam Ship Company v. *The Port Wardens*, 6 *Wal.* 33.
The State Tonnage Tax Cases, 12 *Wal*, 215.
Walton v. *The State of Missouri.*

Now, clearly this liability imposed by the Indiana statute, is not a matter local in its nature, and requiring different rules in different states or different localities, but it is a matter in reference to which a uniform rule may be established, and

should be established if any is established; and it is not a matter, therefore, which the states can regulate, so far as it relates to vessels engaged as these were.

I know it is said that this act does not purport to be a regulation of commerce. Neither did the act of California which came in review in the case of *Hays* v. *The Pacific Mail Steamship Company;* or did the laws of New York and Massachusetts, which came in review in the *Passenger Cases*; nor did the act of Louisiana, which was considered in the case of *The Steamship Company* v. *The Port. Wardens*; nor that of Alabama, in the case of *Sinnot* v. *Davenport*; nor did the law of Alabama or that of Missouri considered in the tonnage or license case purport so to be.

But it does not mend the matter to say that they do not purport to be regulations of commerce. The law in question is an *imposition of a new liability upon the maritime contract of the passengers, and upon this commerce,* which the state can not place upon the owners of vessels built, fitted up, and being navigated as these were. It is also a new liability imposed upon his contract when viewed from its common law stand point, and equally void.

In the *Passenger Cases,* Mr. Justice Catron uses the following very expressive language, which gives a correct view of the law upon this point.

"Throughout the Union, our vessels, of every description, go free and unrestrained, *regardless of state authority. They enter at pleasure, depart at pleasure,* and pay no duties. Steamboats pass for thousands of miles on rivers that are state boundaries, *not knowing or regarding in which jurisdiction they are,* claiming protection under these provisions of the constitution. If they did not exist, such vessels might be harassed

by insupportable exactions. If it be the true meaning of the constitution, that a state can evade them by declaring that the master may be taxed in regard to passengers, citizens and aliens, and that the state may assess the amount of tax at discretion, then the old evil will be revived, as the States may tax at every town and village where a vessel of any kind lands." 7 How. 446.

And is not this more true of impositions like those created by the statute of Indiana?

If the power to regulate commerce among the States, to impose taxes, liabilities, or burdens upon it, be exclusive in Congress, the act of the State of Indiana *being a general regulation of, or imposition upon, the maritime contract to carry passengers, or upon the maritime duty of the defendants* under the laws of the United States, is a regulation of commerce among the States, and void. It provides that these defendants, thus engaged in this commerce, shall be liable in damages for the wrongful act or omission of their officers and agents, resulting in death. What is this but a regulation of, or imposition upon, this commerce?

FIFTH.

Congress has regulated this commerce as far as it was thought wise that it should be regulated.

I have stated above that the power to regulate commerce among the states, except so far as such regulation relates to matters of a purely local character, or is adopted by Congress, was exclusively vested in Congress; and that this statute, if applied to these defendants, if not regarded as a regulation of

commerce, was at least an imposition upon the same, inconsistent with the right to a free navigation authorized by the license and by virtue of the Constitution and Laws of the United States. But it matters not whether this power be exclusively vested in Congress or not: for Congress has not only regulated this commerce, but these regulations relate to injuries and death caused to passengers and others upon such vessels, by the carelessness and neglect of the officers and crew, and the States therefore can enact no general regulation such as this is, in relation to the matter.

Congress has regulated this commerce as fully as it has thought best; *first*, by that system of laws relating to the registry of ships engaged in the foreign commerce, and those relating to the coasting trade and fisheries, by virtue of which vessels and steamers coasting along the shore, or running upon our navigable rivers, are licensed and enrolled and subject to, and are compelled to pay tonnage and hospital dues; and, *secondly*, by those laws passed for the better security of the lives of the passengers on vessels propelled in whole or in part by steam, and other kindred laws.

Under the first of these laws these steamers are measured, and pay their hospital and tonnage dues, and various regulations are made in reference to their carrying of cargo. They are also licensed and enrolled under these laws; and these acts have ever been regarded as regulations of the commerce with foreign nations and among the states. This is the view taken of these laws in the case of *Gibbons* v. *Ogden*, in the *Passenger Cases*, in *Sinnot* v. *Davenport*, in the case of *Pennsylvania* v. *The Wheeling and Bel, Bridge Co.*, and *State Tonnage Cases*, 12 Wal. 215, and *Malton* v. *Missouri*.

The laws for the better security of the lives of passengers upon vessels propelled in whole or in part by steam, regulate the building, equipping, and navigating these vessels. They provide for a board of men to examine hulls and boilers, and for the examination of engineers and pilots, and for their licenses. They fix many penalties upon the captain and owners, and provide for the rules relating to the practical navigation of the vessels, and for the liability of the master, engineer, and pilot, to a passenger who shall be injured by a neglect of such regulations; all of which numerous provisions are for the sole purpose of the better security of the lives of passengers upon these vessels—so declared to be in these acts. They provide for the liability of the owners to such passengers for "damages sustained by him or his baggage from explosion, fire, collision, or other cause," and for the liability of the vessel. (See Secs. 29 and 30 of the act of August 30, 1852, 10 Stat. at Large, 72, 73.)

These laws go into all the details of building, equipping, and running said vessel, and imposing penalties and damages upon the officers and the owners. The act of 1871, covers 20 pages of the Statutes at Large, (17 Stat. at Large.) and is a re-enactment of the previous laws upon the subject. And these acts authorized supervising inspectors to make rules for the government of pilots, and fixed damages and penalties for the breach of such rules. These supervising inspectors have enacted such rules relating to whistles, mode of management of the vessels, &c., &c.

And the secretary of the treasury was also authorized to make rules and regulations as to carrying certain articles, such as coal oil: which led to this disaster. (14 Stat. at Large, pp. 227–8)

which this record shows he had done. These acts also authorized the local inspectors to license steamers to carry many of these articles; and which this record shows to have been done.

These laws also change the rules of evidence, and the presumption prevailing against the officers and owners of such vessels by making "an injurious escape of steam full *prima facia* evidence, sufficient to charge the defendant, or those in his employ, with negligence, until he shall show that no negligence has been committed by him or those in his employment." (*Sec.* 13, *act of July* 7, 1838, 5 *Stat. at Large*, 306.)

The 12th section of the same act is in these words:

"SEC. 12. And be it further enacted, that every captain, engineer, pilot, or other person employed on any steamboat, or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessels may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof, before any Circuit Court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years."

Here is a provision covering peril to life, and punishing by imprisonment those in charge of the vessels, by whose neglect the lives of passengers are destroyed; and this covers the captain, pilot, engineer, or other person employed upon the said boat. It reaches every man on the said boat.

Section 30 of the act of August 30, 1852, is in these words:

"SEC. 30. *And be it further enacted*, That whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the

owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through any known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or willful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot, and recover damages for any such injury caused as aforesaid by any such engineer or pilot." (10 *Stat. at Large, pp.* 72, 73.)

This covers damages to the passenger or his baggage from "explosion, fire, collision, *or other cause*," and makes the master and owner liable. It also gives damages to any person sustaining injury through the carelessness, negligence, or willful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law provided by said act. Secs, 28 and 29 also bear upon the same subjeet, This covers the precise matter for which damages are imposed by the Indiana and Kentucky statutes. In the late case of *Spingleburg* v. *These Defendants*, for death arising from this very disaster, the Court of Appeals of Kentucky held that these acts covered the whole subject, and that no recovery could be had against the defendants except those provided for in these acts. The case is not reported except in the newspapers.

Take Secs. 12 and 13 of the act of 1838, and Secs, 29 and 30 of the act of 1852 in connection with the laws before named, and who can say that Congress has not regulated this matter as fully as it deemed proper, and regulated it in fixing damages, penalties and punishment for any carelessness on

such vessel resulting in the injury to passengers or their baggage, or loss of life; and can it now be claimed that this provision of the Indiana law upon the same subject can be applied to vessels like the United States and A merica, and which were thus employed? Clearly not.

Houston v. *Moore*, 5 *Wheat.*, 22.
Pennsylvania v. *The W. & B. Br. Co.*, 13 *How.*, 566.
Holmes v. *Jennison*, 14 *Pets.*, 577, 578.
The Barque Chuson, 1 *Story*, 466.
Smith v. *The Eastern R. R., Co.* 1 *Curtis*, 259.
City of New York v. *Milne*, 11 *Pets.*, 159.

There are many other acts by which Congress has regulated these vessels, their management, and the liability of the officers and owners under them. See the 3d sec. of the act of March 3d, 1835, which punishes "the master or other officers of any A merican ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the UnitedStates," for abuse of the crew of such vessels. (4 Stat. at Large, 776, 777.)

Here is a special regulation for the protection of the crew. I need not go over all those laws, for those above named are specific regulations upon the identical matter in issue, relating to passengers and crews.

We need not resort to the rule established in *Houston* v. *Moore*, and since repeatedly followed, that whenever it appears that Congress has had any subject matter before it, its will is as much found in what it did not enact as in what it did, for here the liability of the officers and owners of such vessels for injuries resulting in death from collision, fire, explosion, injurious escape of steam, or other causes, has been

specially before Congress, and it has made such enactments as in its wisdom it thought best; and under the authority of *Houston v. Moore* and that class of cases, the States of Indiana and Kentucky can not pass such a law even if they have a concurrent power to regulate this commerce. Upon this particular point I call attention to *Houston* v. *Moore* and *Holmes* v *Jennison*, and also to the following clear statement of the law by Mr. Justice Story in the case of the *Barque Chuson*, 2 Story R. pp. 465, 466. He says:

"Perhaps it will be suggested, that if Congress had passed an act upon this subject, it would be of paramount authority, and suspend or control State legislation upon the same subject; but that until Congress shall pass such an act, the States have full authority to act upon it. This I utterly deny. If the power to regulate foreign and interstate commerce be, as I conceive it to be, exclusive in Congress, all State interferences therewith are unconstitutional and void. Congress, having power to regulate the whole subject, regulates it as much by what it leaves without any positive regulations, as by what it expressly provides for. The will of Congress is equally expressed in both cases. It can not be that a State has a right to step in, and, by way of complement, fill up by its own legislation, what is not actually occupied by that of Congress. Such was the doctrine maintained by the Supreme Court in *Houston* v. *Moore*, 5 Wheat. 1, 21, 22. *Holmes* v. *Jennison*, 14 Peters, 540, 569, 574 to 579."

The cases here referred to are in the precise terms stated by Mr. Justice Story in this quotation, and I do not understand that they have ever been overruled by this Court. On the contrary they have often been acted upon.

Whether this power of Congress be exclusive or not,

Congress having passed upon this very matter, the States no longer have power to pass any act upon the subject, and the act in question, so far as it relates to these defendants, is void.

SIXTH.

The necessity of the rule here contended for.

In concluding this point, I would say that the necessity of some uniform rules relating to this commerce is especially felt along the great navigable waters of the West. The State laws are not uniform upon any subject relating to the commerce upon our western rivers. The navigator is constantly passing from State to State over boundary lines not marked or defined, and which he can not know either by day or by night. So that it is impossible for him to know by or under what law he is navigating, or his liability as he goes along, if the several States have this power.

Upon this very subject and in relation to this very disaster, suits were brought in Ohio, Indiana, and Kentucky, and inconsistent statutes have been enacted by the three States with reference to the same persons and locality and inconsistent decisions made by the courts of the three States. Some of these suits were brought upon the Kentucky law, and some upon the Ohio, some upon the Indiana law; some as upon a common law liability, and some in admiralty, and these laws are in direct conflict. The Kentucky law differs from those of Ohio and Indiana upon the point now under consideration, and indeed from all the laws

upon this subject, in allowing punitive damages against a principal for the act of the agent; and each adds new liabilities to those known to the maritime law or to the laws of Congress.

In reference to the matter of actual navigation of the vessel, another law of Kentucky has required the pilot to pursue one course, and a law of Illinois has requirred him to pursue another, and they both differ from the rule of the maritime law.

And the laws last named purport to apply to the navigation upon the Ohio river. The laws of Kentucky and Illinois both undertake to regulate the rules by which steamers shall navigate. The law of Kentucky requires the descending boat to keep the middle of the channel, and leave the sides to the ascending boat. Whereas the law of Illinois requires the ascending boat to keep the middle of the channel, and the descending boat to keep the shore.

Stanton's Ky. States. Vol., 1, *p.* 206. *Sec.* 14.
Statutes of Ill. (*Ed.* 1857), *p.* 1129.
Moore v. *Moss*, 14 *Ill.* 106.

Neither of these laws agrees with the rule of the maritime law, which requires careful and skillful navigition, or with the rules of the inspectors, established under the law of August 30, 1852.

And a law of Louisiana which came before the Circuit Court of the United States for the District of Ohio, and this Court in *Haldeman* v. *Beckwith*, relating to the Mississippi river, required a boat to be navigated in a particular way. A very different law existed in the State of Mississippi, which lies directly on the other side of the river, for there the com-

mon law and maritime law alone existed. (1 *Bullard & Curry's Digest*, 784, 579.)

If each State bordering upon these great rivers could slip in and add what they deemed needful any commercial system would be impossible.

Instead of there being any system of commerce between the states that any one could keep hold of, understand and follow (much less the boatmen navigating along our great rivers), it would be an inexplicable patchwork, leading to the greatest confusion and injustice, and embarrassment.

The utter impossibility of commerce being carried on with any security upon our navigable rivers, which are the boundaries of States, without some supreme and uniform law has long been felt, and these various State rules or laws have imposed great injustice upon persons engaged in this commerce. The various lien laws are of every imaginable character, and the decisions of the courts also differ, so that no navigator can know when he purchases a boat, whether he has any title or not, or what it is; nor can any lawyer, however learned, tell him, for he can not keep run of these various State laws and decisions. And when a vessel is sold under these State laws, she is inevitably sacrificed, for such sale carries no title out of the particular State in which she is sold.

Wright v. *Maxwell*, 4 *Gibbs*, 51.
Germain v. *The Steam Tug Indiana*, 11 *Ill.* 538.
Ritter v. *Steamboat Jamestown*, 23 *Mo.* 350.
The Globe, 2 *Law Rep. U. S.* 501.
O'Callighan v. *Riggs*, 5 *Am. Law Reg.* 140.
Ashbrook v. *The Golden State*, 5 *Am. Law Reg.* 156.
The Steamer Henrietta, *Newb. Ad. R.* 291.

The wisdom of placing this commerce under one uniform and supreme law is therefore evident, and never more clearly so than in reference to the navigation upon our great rivers. And it is evident that one uniform system under and originating from the National Government, and throwing its protection over all alike is an impossibility, if the States can step in and pass laws of the character in question. Congress having regulated this navigation, so far as it deemed best, and not having enacted such a law, it must be held that it is its will that no such liability shall be applied to such vessel. In such a case its will is as much discovered by what it does not declare as by what it does. See 33d, 34, and 35th pages of this brief.

How applicable this rule is to this particular subject is evident from the action of Congress at the last session. A law limiting the liability of vessels upon our inland water to the value of the ship passed one branch of Congress at its last session and is now before the present Congress, and has received the unanimous recommendation of the Committee of Commerce of the Senate. Instead of extending this liability the tendency of Congress is now and for some years has been in the opposite direction.

It is quite apparent what would have been the condition of this commerce, long ere this, except for the decisions of the Supreme Court of the United States before alluded to. Anything like a free, energetic, national commerce would have been an impossibility.

SEVENTH.

The License frees these Appellants from this liability.

These boats were running under a regular license and enrollment from the General Government, issued by virtue of the laws relating to the coast trade and fisheries. This license was an authority for them thus to navigate, free from obstruction, or added liability from State laws. So it has frequently been held by the Supreme Court of the United States.

Pennsylvania v. *The W. & B. Br. Co.* 13 *How.* 565.
Gilman v. *Philadelphia,* 3 *Wal. pp.* 713.
The Passenger Cases, 7 *How.* 445, 446.
The State Tonnage Cases, 12 *Wal.* 215.

The license is a protection against any such liability. This license is an authority to carry on such commerce, free from such impositions.

Gibbons v. *Ogden,* 9 *Wheat.* 213, 215.
Pennsylvania v. *The W. Br. Co.* 13 *How.* 566.
Gilman v. *Philadelphia,* 3 *Wal.* 215.
The State Tonnage Cases, 12 *Wal.* 215.

In the case of *Gibbons* v. *Ogden,* the Court say:

"The word 'license' means permission, or authority; and a license to do any particular thing is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right which the grantor can transfer to do what is within the terms of the license."

Further on they say (pp. 213, 214):

"The object of the license, then, can not be to ascertain the character of the vessel, but to do what it professes to do—that is, to give permission to a vessel already proved by her enrollment to be American, to carry on the coasting trade."—p. 215.

In the case of *Pennsylvania* v. *The Wheeling & Bel. Bridge Co.*, the court says:

"No State can hinder or obstruct the free use of a license granted under an act of Congress. Nor can any State violate the compact, sanctioned as it has been, by obstructing the river."—p. 566.

In the case of *Gilman* v. *Philadelphia*, 3 Wall. 725, the court says:

"A license under the act of 1793, to engage in the coasting trade, carries with it right and authority."

In the *State Tonnage Cases*, 12 Wall. 215, the court says:

"Evidently the word 'license,' as used in that act, as the court say in that case, means permission or authority, and it is equally clear that a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, that it transfers to the grantee the right to do what it purports to authorize."

See also quotation from Judge Catron's opinion, p. of this brief.

What becomes of that authority to carry on this com-

merce, from the supreme power of the nation, under such license and under the maritime law, if a State can add to a maritime contract, or to parties thus engaged, liabilities of this kind? Where will it end? What may not the States impose upon this commerce, if this can be imposed? Such an imposition has none of the excuses presented in the *Passenger Cases*, or in the case of *Hays* v. *The Pacific Mail Steam Ship Co.*, or in that of the *Steam Ship Co.* v. *The Port Wardens*, or in that of *Sinnot* v. *Davenport.*

APPLICATION OF THESE PRINCIPLES TO THE RECORD.

If these principles are correct, then it is quite evident that the court erred all through the case.

It erred in striking out the answers. It specially erred in sustaining the demurrer to the third paragraph of the answer. That paragraph set out fully, and in detail, facts showing that the said steamers were at the time built, fitted up, manned, and equipped, in all respects in accordance with the laws of the United States, relating to such vessels; had regularly paid their hospital and tonnage dues; were enrolled, and carrying on commerce among the States, under said laws, and by virtue of such license, enrollment, and inspection papers.

This was also fully shown at the trial. And the record shows that the license of the pilots, the license of the vessels, the enrollment and inspection papers were in proof, and full proof was made that the vessels were built, fitted up, manned, equipped, owned, and were being navigated, in all respects, according to said laws, so as to entitle them to all the privileges of ships and vessels of the United States, and to all the privi-

leges and exemptions of such laws, and the case falls fully within the principles of the decision of this Court of the United States before referred to.

It is also evident that the court erred in sustaining the demurrer to the 3rd defense, and in the general charge, and in giving charges 14, 18, 20, 21, 22, 23, 24, and 25 of the plaintiffs, and in refusing charge number 24, asked by the defendants.

EIGHTH.

The common law as effecting this point.

It is claimed that there is nothing relating to commerce, which can interfere with the common law remedies against these vessels or to the remedies *in personam* against the owners thereof, and the question is put as though the plaintiffs in error have claimed that there was.

It has never been claimed by the plaintiffs in error, that the constitution or laws of Congress upon this subject took away the common law remedies of the states; or in any way prevented the states from passing acts which merely related to the remedy, so that in so doing they did not go beyond a mere remedy and effect the rights of parties who were protected from such legislation.

And here is the very point.

The act in question is more than a new remedy for an existing right. It gives a right of action where none existed before—imposes a new liability. It is so understood in Indiana and in the State Courts generally.

See specially:

Blake v. *Midland R. N. Co.*, 18 *Ad. & El. N. S.*, 110, 111.

Whitford v. *Panama R. R. Co.*, 23 *N. Y. R.* 468, 469.
The Jef. R. R. Co. v. *Swayne's Adm.*, 26 *Ind.*, 484, 285
Sherlock v. *Alling, Adm.*, 44 *Ind.*, 196, 197.
Woodard v. *Mich. S. N. R. R.*, 10 *Ohio St.*, 123.
Penn. R. R. Co. v. *Henderson*, 51 *Penn. W.*, 323.
Pym. v. *The Gt. W. R. W. Co.*, 4 *B. & S.*, 406.

Thus in *Blake* v. *Midland R. N. Co.*, the court say:

"But it will be evident that this act does not transfer this right of action to his representation, but gives to the representative a totally new right of action on different principles * * * * the measure of damages is not the loss or suffering of the deceased, but the injury resulting from his death to his family. 18 *Ad. & El. N. S.*, 110, 111.

In *Pym.* v. *G. W. R. W. Co.*, the court (*Erle C. J.*) say:

"The statute as appears to me, gives to the personal representatives a cause of action beyond that which the deceased would have if he had survived, and based on a different principle." 4. *B. & S.* 406.

In *Penn. R. R. Co.* v. *Henderson*, the court say:

"It is therefore an entirely different right of action from that which would have vested in the decedent if he had outlived the injury." 51 Penn. St. R. 323.

In *Woodard* v. *The Mich. S. & N. Ind. R. R. Co.*, the court say:

"We take it to be clear that no such right of action ex-

isted at common law. It is a right of action given by statute, not to the intestate, but to the personal representatives, not as general assets, but as a trust for the widow and next of kin; in respect of a pecuniary loss they are supposed to have sustained." 10 *Ohio St.*, 123.

And in this very case the Supreme Court of Indiana say:

"It gives a right of action where none existed before,—the right of action in favor of the person killed died with him. No action could be maintained for the death of another unconnected with the loss of services before the law. The right of action which the deceased had at his death, is not by the law transferred to his representatives, but it gives to them a totally new one on different principles." 44 *Ind.*, 196, 197.

The same rule had been before declared in Indiana. 26 *Ind.*, 484, 485. And the same principles are fully set out and determined in the case of *Whitford* v. *The Panama R. R. Co.*, 23 *N. Y. R.*, 468 & 469. *See pp.* 13 & 14.

This class of acts is nowhere, either in England or in this country, treated as giving a mere remedy, but is everywhere understood as giving a new right and imposing a new liability.

And in relation to persons engaged in commerce among the states as were the plaintiffs in error, we claim that this cannot be done.

The distinction here taken is well settled by the decisions of this Court.

Bronson v. *Kinzie, et als.* 1 *How.* 316.
Green v. *Biddle*, 8 *Wheat* 75.
White v. *Hart*, 13 *Wall.* 653.

The rule of this Court is thus expressed by CH. J. TANNEY in *Bronson* v. *Kinzie, et al.*

"Whatever belongs merely to the remedy may be altered according to the will of the State, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case it is prohibited by the Constitution."

The plaintiffs below, can gain nothing by calling this imposition of liability, a new remedy.

"The State may modify the remedy, but not so as to impair substantial rights." *White* v. *Hart*, 13 Wall. 653.

It is equally true that a State cannot under the pretense of providing a new *remedy* create a new *liability*, and impose it upon persons engaged as were the plaintiffs in error.

If under the form of remedial acts, or acts claimed as not intended to regulate commerce, the States could create new liabilities and impose them upon vessels thus engaged, there would be an end of any Constitutional protection. This Court has ever been scrutinizing and careful in its efforts to protect the Constitution from such attacks.

But it is insisted that this action is in the nature of common law remedy. Here again is this error. It is more than a remedy, and is a right not anywhere recognized as part of the common law. It is purely a statutory right added to those given by the common law, for personal injuries, and directly against the principles established by that law, and always administered, until Lord Campbell's act created this right in favor of the widow and children of the party killed.

It is, however, insisted, that because the States may enforce their common law remedies against the owners of vessels thus engaged, that therefore the State of Indiana could create this right, and enforce it against parties whose boats pass along the river, opposite the southern boundary in carrying on their commerce, and who are in the State, or on the river opposite the State, only in carrying on this commerce.

This is another palpable error.

The common law was the law of the people of this country from its first settlement, and before there was, in fact, any commerce. It was the law of all the States before the formation of the Constitution, so far as it was applicable to their circumstances and situation. It was the substratum or basis of the law of the whole country. The common law—the equity system which accompanied it, and the maritime law—these systems of law were the common inheritance of people of this country. But what is known as the common law was so commonly and constantly appealed to, and enforced in the courts that it permeated all our institutions and business relations. And when the Constitution of the United States was formed, it was in reference to the existence of this system of law.

It was taken as a matter understood that the common law was the basis or substratum of our law. The constitution was based upon that idea. The constitution directly confers jurisdiction upon the Courts of the United States, in cases in law and in equity, and to cases in admiralty, and under the maritime law, and so sacred were some of the institutions of the common law, as for instance, the trial by jury, that it is specially guarded in the 7th A mendment. That A mendment reads:

"In suits at common law" (this referring the jurisdiction

conferred upon the courts by the 2nd Sec. of the III Article of the constitution.) "where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in the courts of the United States, *than according to the rules of the common law.*"

The 34th Sec. of the judiciary act, refers to the conduct of trial at common law, and adopts the laws of the states as the rule of decision in such cases. This presupposes that the common law prevails.

The Constitution and the Laws of Congress, where the contrary does not directly appear, proceed upon the idea that the common law prevails in the States, and that the common law remedies may be there enforced.

Mr. Chancellor Kents states this in the following expressive language:

"It was not to be doubted that the Constitution and Laws of the United States were made in reference to the existence of the common law, whatever doubts might be entertained as to the question, whether the common law of England, in its broadest sense, including equity and admiralty as well as legal doctrines, was the common law of the United States. In many cases, the language of the constitution and laws would be inexplicable without reference to the common law; and the existence of the common law is not only supposed by the constitution, but it is appealed to for the construction and interpretation of its powers." 1 *Kents' Com. 9 Ed. p.* 336.

It is, therefore, one thing to let the common law rules and the common law remedies prevail, where nothing appears to the contrary, for they add nothing to the liability of such parties, that did not always exist against them: but it is quite another and different thing to permit the State to create new

rights and liabilities; and apply them to parties engaged in commerce among the States. If this latter could be done, this commerce would be wholly within the power of the States, and might be destroyed by them; and it is beleived that the authorities referred to in this brief have settled the law in opposition to any such right in the States. *See Spiegleberg* v. *Sherly, printed herewith.*

IV.

THE COURT ERRED IN OVERRULING THE 2nd DEFENCE AND IN ITS CHARGES UPON THAT SUBJECT.

FIRST.

This defense also raises a federal question.

It arises in reference to the boundary line of the state. The facts pleaded in this defense, bring in review the cession of the North Western Territory by Virginia, the compact between Virginia and Kentucky under which the plaintiffs claimed to extend this law over the Ohio River, the ordinance of July 13, 1787, and the law admitting Indiana into the Union, and the two conflicting laws of Indiana and Kentucky giving damages for death caused by wrongful acts. These acts and compacts are among these referred to in the petition, bringing the case into this court. *Rec. p. 276.* And the facts pleaded, and the charges given and overruled, bring these questions directly into the case. *Howard* v. *Ingersol,* 13 *How.* 381.

The court gave the following charges for the plaintiffs below.

20. "If you find the Ohio River at the point of collision, and at the point where the States sunk, in the dry season recedes and leaves such space dry, then the sinking and collision of the United States was above low-water mark, and in the territorial limits of the State of Indiana and County of Switzerland. Low-water mark means the lowest point to which the river comes down in the lowest stages, by means of dry seasons the bottom or ground thus left bare and extending out from the shore, and connecting with it by ground or bottom not covered by water belongs to Indiana, though it be covered by water at a higher stage," *Rec. p.* 235.

21. "If you find from the evidence that the United States and America collided in the channel of the river, on the Indiana side of the center of the channel, and below low-water mark on the Indiana side of the thread of the channel, and that she sunk on said side of the channel, and that Sappington, without his fault, was burned to death by reason and cause of said collision: and if you find said collision was caused by the negligence charged in the complaint, and that the parties named in the complaint, are next of kin to Sappington, then the plaintiff is entitled to recover in this action." *Rec. p.* 235.

23. "If the jury find from the evidence that the United States and America collided near the line of low water mark on the Indiana side of the channel, and if you find that from the combined actions of the wheels, and of the United States, and the force and momentum given by the collision, the United States was taken above low-water mark on the Indiana side of the channel, and there sunk and burned; and if you find that Sappington, did perish and die by reason of said collision without his fault; and if you find that said collision was caused by want of proper care of the employees of the defendants in charge of said boats, and left the next of kin named in the com-

plaint, then the plaintiff is entitled to your verdict in this action. *Rec. p.* 235.

In reference to this charge, see charges 4, 20, 25 & 27. asked by the defendants.

These principles were reiterated in the general charge. *Rec. pp.* 248 *to* 250.

The court refused to give the following charges asked by the defendants below, plaintiffs in error.

4. "The defendants have answered that the alleged negligence and want of care, which it *is* claimed, constitutes wrongful acts and omissions within the statute, took place outside of low-water mark of the Ohio River, on the Indiana side, and on said river, within the territorial limits of the State of Kentucky, and that said State of Kentucky, has enacted a statute on the same subject, which is set out in the answer. To this it is replied that the collision of the boats from which resulted the intestate's death took place north of the centre of the Ohio River, and that the force of the collision, momentum of the boats, and action of the winds brought the boat within low water mark of the Ohio River, on the Indiana side, when intestate died in Indiana. If you believe, from the evidence, that defendants' employees were guilty of negligence in navigating and managing their steamer United States, which caused her to collide with defendants' steamboat America, and thereby caused the steamer United States to burn up and sink; and that such negligence and collision occurred outside the low water mark on the Indiana side of the Ohio River; and that in the effort to save the passengers and boat she was, by defendants' employees, brought within low water mark on the Indiana side of the river, where plaintiff intestate died, you must find for the defendants."—*Rec. p.* 238.

5. "If you believe, from the evidence, that the alleged collision between said steamers was caused by negligence, and

that the negligence, collision and death were beyond and outside of low water mark on the north bank of said river, you must find for defendants."—*Rec. p.* 238.

6. "If you believe, from the evidence, that the alleged collision between said steamers was caused by the negligence of defendants' employees, and that the collision and negligence occurred outside of low water mark on the Indiana side of said river, you must find for defendants, no matter where deceased died."—*Rec. p.* 238.

24. "That if there was carelessness of the defendants, causing the death of the plaintiff intestate, shown to the satisfaction of the jury in this case, and even if it be shown that the place where the said carelessness occurred was within the State of Indiana, yet if it be also shown that the carelessness and death happened in the Ohio River away from the Indiana shore, south of low water line, yet the boat was taken north in order to save the boat, cargo and passengers, and at a point navigable for such boats at the time, and if the fact set up in the third paragraph of the answer be proven, then the plaintiff cannot recover.—*Rec. p.* 24.

25. "That if there was carelessness of the agents of the defendants shown in this case, and such carelessness caused the death of the plaintiff intestate, and happened out from the Indiana shore beyond low water mark, and such carelessness put the steamer United States, her cargo and passengers in peril, and in order to save such passengers and relieve them from peril, the officers in charge of said boat, being competent, in good faith used their best efforts to get the said passengers ashore, and in so doing directed the boat toward the Indiana shore, and by the use of her machinery and wheels she was forced towards the Indiana shore to a point navigable and away from the shore, yet above low water mark, where she sunk, and thereby the plaintiff intestate came to his death in Indiana, the plaintiff is not entitled to recover."—*Rec. p.* 241.

26. "That if the jury find that the collision and careless-

ness in this case, if any there was, took place out from the Indiana shore, and that the boat was at the time, and when she sunk and Sappington died, at a navigable point for such boats as the United States and America, and not at the shore; and they also find that the said steamers were regularly inspected by the United States inspector, whose duty it was to inspect such boats within one year of the time of the said collision and death; and they also find the facts set up in the third paragraph of the defense, then they must find for the defendants, even if they should find that the boat sunk and Sappington died between low water mark and the Indiana shore."—*Rec. p.* 241.

27. "We ask the Court to charge the jury that the south boundary line of the State of Indiana is low water mark of the north bank of the Ohio River, and that the territorial limits of the state do not extend to the centre thread of the stream and beyond low water mark, and that proof of negligence of those in charge of the steamboats United States and America, one or both of them, causing the death of Sappington on the river at a point between the said low water mark of said river and the centre thread of the stream, will not authorize the jury in finding a verdict for the plaintiff."—*Rec. p.* 241–242

And as illustrating this point, the court is asked to examine charge No. 20 asked by the defendants below, and the drawing which is a part of it. *Rec. p.* 240. Although this accident occurred in the night time and the water was high, the effect of the charge was that if the accident occurred over any part of that bar, it was in Indiana and the defendants were liable. It was upon this ground alone that the jury answer the special questions as to where the boat sunk and Sappington died.

In reference to the charges in relation to the line of state, rejecting the line of ordinary low water mark, and adopting

the line of the lowest water mark at the lowest stage, (which a jury might say was below anything that has ever been yet known. The above charge 20 was asked. (*Rec p.* 240), and charges 25 and 26 were asked. (*Rec. pp.* 245, 246.)

The plaintiffs below claimed those charges as law, upon the distinct ground that the compact between Virginia and Kentucky authorized the State of Indiana to extend her laws over the river beyond her territorial limits, and create and enforce rights for acts and things done within the state of Kentucky, and inconsistent with her laws upon the same subject.

The defendant below denied that that compact could receive any such construction or effect under the cession of territory of Virginia to the United States, under the ordinance, and under the law admtting Indiana into the Union. And this raises a federal question in reference to the second defense.

This will more fully appear as we proceed.

SECOND.

The law in question could not impose damages for acts done beyond low water mark, between the centre thread of the river and low water mark on the Indiana shore.

The State of Virginia claimed the ownership of the Ohio River and of the territory on the north-west thereof, or at least a portion of it, and this claim was recognized by the United States, and by many of the States, or at least to a certain extent.

After much dicussion and some negotiation, Virginia surrendered her territory on the north-west of the Ohio to the

United States in trust, that it be formed into States and admitted into the Union with certain reservations and conditions as to the use and navigation of the Ohio River. It was in obedience to this cession and trust, that the State of Indiana was afterwards formed from this territory. Long prior to this however the United States had passed the act for the Government of the territory North-west of Ohio. This is the celebrated ordinance which gave law and life to that vast territory, and was the basis of the law of the states since formed.

This ordinance was passed July 13th, 1787, and was continued in force after the constitution was adopted by the act of Congress of August 7th, 1789. 1 *Stat. at L.* 50, 51. The ordinance had the following provision:

"The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well as to the inhabitants of the said territory, as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without any tax, impost or duty therefor. *Chase's Stat.* 69: *Journal of Congress, Vol.* 4. *p.* 754.

The contract between Virginia and Kentucky has the following provision.

"SEC. 2. *Seventh:* that the use and navigation of the river Ohio, so far as the territory of the proposed State, or the territory which shall remain within the limits of this commonwealth, lies thereon, shall be free and common to the citizens of the United States; and the respective jurisdiction of this commonwealth and of the proposed State on the river as aforesaid, shall be concurrent only within the States which may possess the opposite shore of the said river."

1 *Stantons Rev. Stat. of Ky. p.* 83.

This was in the form of an act of Virginia, passed Dec. 18th, 1789.

This was more than five years subsequent to the deed of cession, which was made on the 1st of Mar. 1784, and more than two years subsequent to the said ordinance, and must be construed with reference thereto.

The history of that cession is as follows:

Congress, by an act of 6th of Sept., 1780, recommended that the States "having claims to waste and unappropriated lands in the western country, to make a liberal cession thereof to the United States, for the common benefit of the Union." *Journals of Congress, Vol.* 3, *p.* 516.

The State of Virginia, did, on the 2nd of January, 1781, "yield to the Congress of the United States, for the benefit of said States, all right, title, and claim which said commonwealth had to the territory north-west of the river Ohio, subject to the conditions annexed to said cession." 10 *Hennings Stat.* 564.

These conditions being somewhat modified by a resolution of Congress of Sept. 13, 1783, (*Journals of Congress, Vol.* 4, *pp.* 267, 268.) Virginia did assent to such modification, and on the 1st of March, 1784,

"Convey, transfer, assign, and make over, unto the United States, in Congress assembled, for the benefit of said States, all right, title, and claim, as well of soil as jurisdiction, which this commonwealth hath to the territory or tract of country within the limits of Virginia charter, situate, lying and being to the north-west of the river Ohio, subject to the terms and conditions contained in the before recited act of Congress of the 13th day of Sept. last; that is to say, upon conditions," &c. (1 *Chase Stat. p.* 62, 4 *Journal of Congress* 341.)

The modifications of Congress did not in any way affect the question of boundary or transfer of title and jurisdiction, nor the fact that the United States was to hold the same for the purpose of forming future states to be admitted into the Union, therefrom.

The title, then, and the jurisdiction so transferred for the purpose of forming such future states, was of the territory, "situate, lying and being north-west of the Ohio river," This Court has so determined.

Handley's Lessees v. *Anthony*, 5 Wheat. 379, 380.
Howard v. *Ingersoll*, 13 How. 414, 415.
State of Ala. v. *State of Geo.* 23 How. 514.

The decision of the State Courts of the States interested in this question, have been to the same effect.

Stinson v. *Butler*, 4 Blackf. 285.
Flemming v. *Kennox*, 4 J. J. Marsh. 158.
McFaii v. *The Commonwealth*, 2 Met. Ky. 396.
Garner's Case, 3 Gratten, 684, 685.
Brenner's Lessee v. *Platten*, 6 Ohio, 508.
Booth v. *Hubbard's Adm'r*, 8 Ohio Stat. 246.
Sherlock v. *Alling's Adm'r*, 44 Ind, 190 to 192.

These decisions are in accordance with the known rule found in Vattel, and other authors upon the laws of nations, to the effect, that when a state owns territory, through which a large navigable river flows, and she conveys the territory on one side of the river, that she retains the river within her dominion.

What then is the meaning of the compact relied upon to sustain this strange idea, that the Ohio River is part of Kentucky, and at the same time is a part of Indiana, and is

subject to the will and laws of two states, each having the same right and power to govern and control it!!

It lies at the very A. B. C. of the law, that the same territory cannot be subject to the states, each having equal power over the same. Some other construction must be given to this compact. And it is quite evident what this construction is.

The compact being subsequent to the cession of the territory by Virginia to the United States, and subsequent to the ordinance of 1787 could not govern or control question as to territorial rights, and therefore had direct reference to the navigation and use of the river, and to the serving of process upon it and to such things, as left the power to pass laws in relation thereto in the state owning the territory.

The fact is that it was a part of the early policy of the country to make its great navigable rivers, especially those forming the boundary line of states as free to the people for all use, as highways, as the ocean. This is found in our early treaties in relation to the Mississippi River, and it was impressed upon the Ohio by the deed of cession, by the ordinance and by this compact. This policy of the government has been so important, that in most of the acts relating to the admission of states bordering on those rivers into the Union, it has been one of the fundamental conditions of admission of such state.

See. 2nd Sec. Statute, Admitting Illinois into the Union, 3 *Stat. at L.*, 429.

3d Sec, Statute, Admitting Iowa into the Union, 5 *Stat. at L.*, 744.

3d Sec, Statute, Admitting Wisconsin into the Union, 9 *Stat. at L.* 59.

2nd Sec., Admitting Minnesota into the Union, 11 *Stat. at L.* 166.

It was but in accordance with this policy, that the terms of the compact, were drawn in reference to concurrent jurisdiction. The introduction to these words show it: "that the use and navigation of the river Ohio, so far as the territory which shall remain within the limits of this commonwealth lies thereon, shall be free and common to the citizens of the United States, and the respective jurisdiction," etc. The river being navigable, and one of the great national highways of commerce, was, by the constitution, placed under the jurisdiction of the United States, and Congress would have full right to enact that part of the ordinance relating thereto, without regard to the terms of the cession, had the constitution then been formed, and surely had a right to adopt it by the act of Aug. 7th, 1789, which was adopted six months prior in date, to the compact. 1 *Stat at L. p.* 50, 51.

And this compact must be made consistent with the terms of the ordinance in this regard. It must *not* be construed in dustrection and disregard of all rules of law. Virginia could have no motive in granting such an extended sovereignty over her admitted territory, and her subsequent acts and those of Kentucky in extending their counties over the river, show that neither of them so understood it. The same is true of their Courts. *See Garner's Case,* 3 *Gratton,* 664, *Booth* v. *Hubbard,* 8 *Ohio St.* 246. At any rate when Indiana came to be admitted into the Union she came in upon the express condition found in the Ordinance as to the free navigation of the Ohio, as a great national highway.

The ordinance provides for the free and unrestrained use of the river as common highway, subject only to the power of

Congress over commerce. It was intended to be left as free to the people of the country as the ocean; and is it claimed that any state could pass such a law as to any part of the ocean? In such case the difficulties created to navigation would be much less, for by the compass and the log the navigator might have some idea when he came opposite to, or along the shore of any particular state; but in relation to the navigation of these rivers, it is impossible to tell when the boat passes from one state to another, and especially is this so if the passing over a flat low bar is the passing into another state. *See charge* 20, *Rec. p.* 240. No boatmen under such a system can know anything of the liability he comes under in carrying on this commerce.

THIRD.

The difficulties created by the construction put upon this compact by the Supreme Court of Indiana.

The law of Indiana in question may well be held to apply only to acts and things done within the State. No violence whatsoever is done to any of its terms in so construing it. It is in accordance with the decision of Indiana in the case *Richards* v. *The Steamer J. P. Toned*, 9 *Ind.* 527, so to construe it.

In that case the Court held that the lien law of Indiana, which in general terms, applied to all boats without limit of space, could only apply to contracts made and things done in the State. Upon the question here presented the Court in the case last named say:

"Generally speaking, a law can have no force beyond the territorial limits of the state enacting it; nor should any legislative act be intended to have such force, unless such intention be clearly and specifically expressed. In the statute before us, there is, indeed, nothing inconsistent with the construction that would confine its operations within the limits of the state; and it seems to us that any other construction would lead to the absurd consequence of property being encumbered with a lien for a claim growing out of a contract entered into by parties who could not, at the time they contracted, have contemplated the existence of such lien." 9 *Ind.* 527.

This is a clear statement of a well known fundamenta rule, and it fairly applies to the facts of this case.

But look at the consequences of the ruling of the Supreme Court of Indiana in the case now under consideration!

Both Virginia and Kentucky extended their counties over the whole river to low water mark on the opposite shore.

Virginia Act of Assembly for 1820, *p.* 66. 1 *Stanton's Stat. p.* 220.

These states legislated with reference to the river as within their admitted boundaries, so declared at an early day in Indiana, Ohio, Kentucky and Virginia, and by this Court.

As early as 10th of January, 1810, Kentucky in distinct terms by statute so declared. This was more than six years before Indiana was received into the Union. *Statute of K., by Moorehead* v. *Brown, p.* 268.

Until the late constitution of Indiana was adopted, no other idea was entertained.

And Kentucky upon the subject under discussion, to-wit: damages for death, caused by wrongful acts, on the 19th of March, 1854, passed the act before alluded to, which is in these words:

Sec III. "That if the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.

Sec. IV. The actions under this act shall be commenced within one year from the time of such death." 2 *Stanton Stat. pp.* 510 *to* 512.

This is the law set up in *totidem verbis* in the 2nd defense.

This law covered the very matter, the very acts for which the suit was brought under the Indiana law in this case. It covered beyond all question, so far as any state could pass such a law, the territory between the Kentucky shore and low water mark on the Indiana shore; and a large number of suits for very heavy damages were brought under it for injuries by this disaster.

One of these suits went to the Court of Appeals, when that Court held that the Kentucky law, as applied to these defendants, and was not valid. The case is *Spiegleburg* v. *Sherley, et. al.*, and is not reported. *See printed copy.*

Here is the confusion, the inconsistency and conflict between the acts of the states, that vexed our early commerce and which more than any other one thing, led to the formation of the Constitution of the United States, and to the placing the commerce of the country, foreign and interstate, under the exclusive control of the general government.

No case could better illustrate the difficulties under which this commerce would labor than this.

The boatman in navigating up and down the Ohio River

is constantly passing from state to state, over boundary lines which, (according to the rule laid down by the Supreme Court of Indiana) are not defined, and which he cannot recognize or ascertain in the day time even—much less in the night. Nor can he know what law he is subject to, or what his liabilities are, and if the decision of the Supreme Court of Indiana is right in this case, is subject to two inconsistent laws, and may have to suffer under both of them.

The Supreme Court of Indiana in this case felt the force of this difficulty, and endeavored to meet it by saying that when Indiana had rendered a judgment the State Court of Kentucky could not proceed.

But both might commence and go on together, as was the fact in a number of cases relating to this disaster. And I do not know that the Courts of Kentucky would take the same view of the subject, that the Indiana Court has. They might say: our law differs from yours, you have punished under your law, and we will punish under ours; or a Kentucky Jury might say: this thing did not take place over that bar; or they might say: the State of Indiana had no right to pass a law relating to Kentucky territory, or to oust our jurisdiction, and we shall proceed irrespective of the judgment in Indiana. And I know of no power that could prevent this confusion, wrong and injustice, except the power of this Court to enforce the constitution and laws of the United States in relation to commerce.

No doubt the ordinance and the compact between Virginia and Kentucky, give concurrent jurisdiction for certain purposes—for the use and navigation of the river, for service of process, seizing boats and perhaps arresting criminals, and

for some such purpose in which both states are interested. But surely this provision can not be extended to the regulation of the rights and conduct of parties, or to the fixing of liabilities by each state in its own way, and according to its own discretion.

Steamboat Champion v. *Jantzen*, 16 *Ohio*, 91.
Daniels v. *Stephens' Lessee*, 19 *Ohio*, 243.
Turner v. *Lewes*, 2 *Gibbs*, *Mich.* 353.
Young v. *Steamboat Virginia*, 2 *Handy*, 142.
Wightman v. *Steamboat Geo. Albro*, 4 *Am. Law Reg.* 121.

A rule which should authorize one state to pass a law fixing rights and liabilities for acts and conduct in another state, as Judge Spencer said in *Young* v. *Steamer Virginia:*

"Would subvert every principle of natural rights, it would lead ultimately to the destruction of all intercourse between us and citizens of other states." 2 *Handy*, 142.

FOURTH.

The special findings do not relieve the case from these difficulties.

It is probable that the general principle above stated will not be disputed, for it is said that the jury has found that the collision and death took place in Indiana.

But the complaint charges that the United States sounded the first whistle, and the two boats proceeded on at very great speed until they got too near to avoid a collision, before they discovered the mistake of whistles—that the United States had

no lookout; and these things, with her carrying of coal oil, are the wrongful acts and omission charged, and it is not the collision or sinking; and the court ruled that the jury could consider no other grounds of recovery.

The record shows that when these things happened, the boats were both in the channel, and beyond low water mark. There is in the evidence, pleading, or finding nothing to the contrary. Indeed, it is admitted by the pleadings.

This is not at all in dispute; nor is it claimed or intimated that after these boats got within some two or three hundred yards of each other, and when they discovered that a mistake had been made in the whistles, that there was any wrongful act or omission.

Being slightly inclined to the Indiana shore, (nearest which shore the channel runs), they endeavored to avoid the peril by backing their engines, and turning so far as they could toward the Indiana shore, which brought them nearer the shore and brought them upon the outer edge of a low bar running out into the river, where they arrived when the United States sunk—at least the plaintiffs below so claimed. In their thus endeavoring to avoid the danger then become apparent and get to shore, there is no claim of neglect or wrongful act.

See charge 20, *where this bar is drawn.*

The Court charged in several charges, that it did not matter whether the wrongful act or omission occurred below low water mark or not, as Indiana has concurrent jurisdiction to enforce her civil or criminal laws over the whole river, and the jury has made no finding as to whether the wrongs charged against the defendants were within or beyond low water mark. *Rec.* 264 *to* 266.

The real gravamen of the statute is the wrongful act or omission. It is for that, that the defendant is subjected to pay damages, and not for honest efforts to save the injured party after peril appeared in which there is no wrongful act or omission, but only such acts as are free from want of care or skill, and are praiseworthy. If the wrongful act or omission occurred in Kentucky, then the Kentucky law affixes the consequences of such wrongful act or omission, and hence we see that for precisely the same act or omission the defendants are sued in Kentucky, under the Kentucky law, and in Indiana and Ohio under their several laws.

Neither the Indiana nor the Kentucky laws make it a condition that the party shall die within the State, and as the act is one sounding in tort—for damages—it is quite evident that it is the "wrongful act or omission," to use the language of the Indiana law—or the "willful neglect," in the language of the Kentucky law—or "the wrongful act, neglect, or default," under the Ohio law—which is the cause for which suit is brought.

It is not the death simply that gives the cause of action, but it is the death resulting from a wrongful act or omission. Unless the law can act upon such wrongful act or omission, it can not give a cause of action therefor, though death ensue. As it is not the death simply, but the neglect and want of care that gives the right of action, it is evident that it is not very material where the party dies; the statute does not make it so, and upon the general principles the wrongful act or omission must be within the operation of the law to give an action therefor sounding in tort.

If a man was injured upon the land in Indiana and went

across or was taken across the river to Kentucky, where he died, is it not clear that a right of action would exist under the Indiana law, and not under the Kentucky law? Or, if he was placed in imminent peril, and to escape it he went to Kentucky, where he died from the efforts to escape, what law, under these acts would apply? Clearly it must be the law which operated upon the wrongful act. In such a case, upon general principles, it is difficult to see how any cause of action could exist, under the Kentucky law.

Nor does it make any difference that the action happens on the river, if in fact that which creates the cause of action, the neglect or wrongful act, do in fact happen within the territorial limits of Kentucky and beyond the territorial limits of Indiana. The court avoided this course of reasoning by assuming that the laws of both held sway over the whole river by virtue of the compact between Virginia and Kentucky.

Except for my respect for the learned judge that decided this cause, I should feel like apologizing for any labored argument to show that no law of Indiana could be held to effect acts and conduct out of the State, and to give a cause of action where none existed before, and when another and different law operated upon such acts and conduct; or to show that two inconsistent laws could not apply to the same party and the same act, or that this Compact could be construed so as to affect such consequences.

The effort to escape the peril is not a continuation of the wrongful acts; that is charged to have been the blowing of the whistle first, by the United States, and the neglect to stop until within two hundred yards, when the danger first

appeared, and the want of a look-out. These acts are distinct and different from the subsequent efforts to escape the danger, and which brought the boats over this bar, and above low water mark, where the collision happened.

I maintain, therefore, that this Indiana law can not be applied so as to affect causes arising as did this, and that the construction put up the compact in question was erroneous, and was inconsistent with the other laws of the United States relating to the use of the river.

FIFTH.

That the collision happened, the boat sunk and Sappington died above low water does not change the conclusions above stated if the river was there navigable.

The plaintiffs below, feeling that it was absurd to claim that a recovery could be had under the Indiana law for an act done within the State of Kentucky, though they had got the court so to charge, endeavored to prove that the collision and death happened within the State of Indiana. They did not undertake to show that the wrongful acts or omissions took place in Indiana, for it was quite clear from the whole evidence that there was no chance for that. But they gave proof of a low flat bar just touching the Indiana shore and running out into the river, which was only seen at extreme low water, and then but barely seen—a bar but a few yards wide only. And they got the jury to find that the collision and death of Sappington occurred in Indiana, because they occurred over this bar. For a description and drawing of this

bar, see charge No. 20, asked by the appellants, considered under next subdivision. To meet this state of the case the appellants asked the following charge:

26. "That if the jury find that the collision and carelessness in this case, if any there was, took place out from the Indiana shore, and that the boat was at the time, and when she sunk and Sappington died, at a navigable point for such boats as the United States and America, and not at the shore; and they also find that said steamers were regularly inspected by the United States Inspectors, whose duty it was to inspect such boats, within one year from the time of said collision and death, and they also find the facts set up in the third paragraph of the defense, then they must find for the defendants, even if they should find that the boat sunk and Sappington died between low water mark on the Indiana shore."

The third paragraph sets out in full detail that the boat was built, fitted up, manned and equipped, owned and running under the laws of the United States, relating to tonnage and hospital dues, relating to vessels engaged in the coasting trade and fisheries, and to those relating to the better security of the lives of passengers on vessels propelled in whole or in part by steam, were regularly inspected, licensed and enrolled, and were engaged in carrying on commerce under such papers and under said laws, among the States, &c.

This charge raised the question whether as to such vessels so engaged, the laws of the United States govern and protect them from such impositions whether the vessel be within the jurisdiction of Indiana or not if upon a navigable part of the river away from the shore, and whether under the c dinance subject to which Indiana was received into the Union, does not protect the defendants from this liability.

We claim that the Court erred in not giving this charge for the reasons before given. It is clearly settled that the navigator has a right to the use of any and all parts of the river at the time navigable, and where business, necessity, or commerce may call him.

Williams v. *Wilcox*, 8 *Adol. and El.* 329–330.
Morrison v. *Thurnan*, 17 *B. Mon.* 263.
Walker v. *Sheperdson*, 4 *Wis.* 509.

And that the right of navigation is the paramount right.

Yates v. *Milwaukee*, 10 *Wall.* 505.
Lewis v. *Keeling*, 1 *Jones*, (*N. C.*) 307.
Bowman v. *Walhen*, 2 *McLean*, 382.
Grant v. *Davenport*, 18 *Iowa*, 192.
Dalton v. *Strong*, 1 *Black.* 31.
East Haven v. *Hemmingray*, 7 *Conn.* 203.

We would add that, in such a case, it is immaterial that the vessel, she being engaged in such commerce under the laws of the United States, is within the territorial limits of a State or not. Of course, she must, when on these rivers at all times be within the territorial limits of some State. But that does not deprive her of the protection of the Constitution and laws of the United States against such impositions.

Gibbons v. *Ogden*, 9 *Wheat.* 202.
Sinnot v. *Davenport*, 22 *How.* 238.
Crown v. *Maryland*, 12 *Wheat.* 445.
The Tonnage Cases, 12 *Wall.* 219.

The fact that the vessel is engaged in commerce wholly within the limits of a state does not deprive it of the protection of the laws of the United States, or take it from under

the admiralty jurisdiction, provided it be upon the navigable waters of the United States. See cases last above cited.

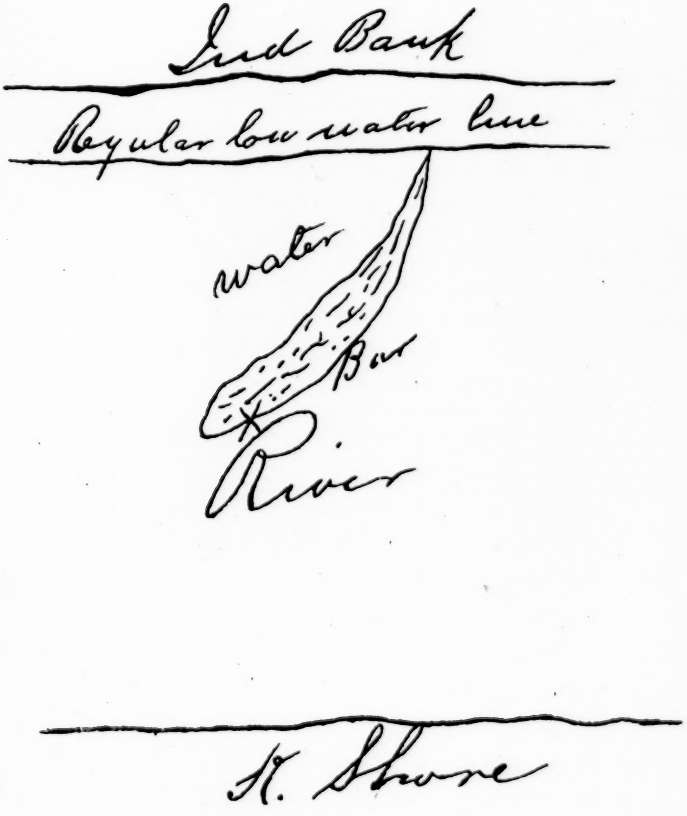
Nelson v. *Leland*, 22 *How.* 55–56.
The Belfast, 7 *Wall.* 640.
Steamboat New World v. *King*, 16 *How.* 469.
The State Tonnage Cases, 12 *Wal.* 214.

In all the many admiralty cases that have related to causes arising upon the great rivers, the vessels were at the time within the territorial limits of some state, and in many of them the river, at the place of disaster, was wholly within the limits of the state. See cases last above cited.

The fact then that the collision and death occurred within the State of Indiana cannot in any way change the rule applicable to these boats.

Nor, indeed, would it change the rule if the wrongful act or omission was shown to have been within the state. So long as the vessel was in the navigable river and navigating it away from the shore, she is under the protection of the laws of the United States, and this liability arising under the Indiana or Kentucky law cannot be imposed upon her.

Further: the bed of the Ohio River at extreme low water mark, presents many spurs of dry land or bars, over which boats pass in a high or ordinary boating state. At such times the exact location of these bars can not be known by day or night. Are these boats governed by one law when passing over these narrow bars and by another when over them? The absurdity of applying state laws of the kind to these vessels will be further seen under the next subdivision relating to charge 20.



only dry at very low water, and which are only attached to the regular low water line by a low narrow strip, such as appeared above?

If this be so, it is evident that, practically, it will be very difficult to tell where that boundary line is, and parties affected by it are likely to have two different and distinct laws applied to them—an Indiana jury finding that the place was in Indiana and a Kentucky jury finding that it was in Kentucky—for the juries in Kentucky will have no trouble on that point.

It is true as to parties on the river when it is high and in a boating stage the difficulty is always presented practically more or less, and this is one of the strongest reasons for holding that these boats are, when upon the navigable portion of the river and not attached to the shore, under the protection of the laws of Congress, and are protected by their license and by said laws from State imposition. It was upon this idea that the charge last above considered was asked. Now if there be a regular line of low water mark along the shore, that line is likely, in the coarse of years, to be known as the boundary line. If it be extreme low water, the lowest that ever has been or may be, can we tell where the boundary line is? When high water is spoken of it is always the ordinary high water.

Blundell v. *Catteral*, 6 *Barn & Ald.*, 304.
Elder v. *Burrus*, 6 *Hump.*, 366.
Atty. Gen. v. *Chambers*, 4 *De Gex. Mc. & G.* 215.
Cortelyon v. *Van Brundt*, 2 *Johns R.*, 361.
Howard v. *Ingersol*, 13 *How.* 383.

It is not anywhere that the highest water or the highest tides are referred to.

The boundary line is held to be low water mark, and as high water mark is considered ordinary high water, so low

water mark is ordinary low water. And thus it seems to be understood.

Stinson v. *Butler*, 4 *Blackf.*, 285.
Elder v. *Burrus*, 6 *Hump.* 458, 268.
Booth v. *Hubbard, Adm'r*, 8 *Hhio St. R.* 243, 248.
Garner's Case, 3 *Gratt.*, 566, 675.

In the noted Garner Case the jury found that at that place, what the boatmen universally understood as low water mark was a stage when,

"The water in the channel on the bars is from 17 to 20 inches; that at extreme low water or where the water was once known to be, the water on said bars in the channel was 11 inches deep." 3*Gratt.* 659.

The bar in question, stretching out into the river, was never known to be, at the highest point, more than two inches above the water. It is but a few yards wide at the widest point. It makes no impression upon the current, and is not noticed in navigating. All this appears in the record. For a large portion of the year, for boats going up, it is navigated over, or boats go inside of it. Its exact locality can not be ascertained by a navigator even in the day-time, much less in the night. Now is it true that for the second when the boats are passing over this bar, they are not only under the admiralty and the laws of the United States, but under the Indiana law and governed thereby; and then for the next second when the bar is passed, they fall under the Kentucky law?

What an absurd condition is our law in, as applicable to this commerce, if this be its construction! There may be a large flat bar in the centre of the river which at an extreme or

possible state of water may be attached to the Indiana shore by a strip of long dry land a yard wide—is this bar in Indiana?

That these inconsistent systems of law, originating in three distinct jurisdictions, can hold and have sway over the same parties and the same transactions at the same time—I think no such thing was ever heard of before.

This was the great difficulty under the articles of the confederation, which was among the chief inducements that led to the formation and adoption of the constitution—it was indeed the want of uniformity in the commercial regulations of the several states. *State Tonnage Cases.* 12 *Wal.* 214.

And it was to create uniformity that the constitution placed this commerce under the power of Congress. It was never imagined then that it would be seriously claimed that the same parties and the same transactions could be brought under two inconsistent laws, and punishment and damages given under either or both for the same act or thing.

It was evident then, as it is now, that any national and vigorous commerce was impossible under such circumstances, and it was therefore placed under the exclusive control of Congress.

So long as the boat was in any part of the navigable river in pursuit of a legitimate commerce, she comes under the great national law of the rivers found in the ordinance of 1787, recognized by Compact between Virginia and Kentucky, and confirmed by the act admitting Indiana into the Union. The United States having formed Indiana from territory ceded to her lying on the north-west of the Ohio River, she was necessarily confined in her jurisdiction to that territory, and could not claim the right to pass laws of this character, and apply them to vessels thus navigating, or enforced

them against owners navigating along the river from state to state in this commerce. This raised a federal question under the laws of the United States, of the same character as that presented in *Howard* v. *Ingersoll*, 13 *How.* 427. The question is here fairly presented as to what is the boundary line between Kentucky and Indiana, under the cession of the territory to the United States, and under the laws of the United States, relating thereto; and what rights to create liabilities for acts and things done outside of the boundary line, the State of Indiana had by virtue of the compact between Virginia and Kentucky. This is a question of grave importance, and its settlement by this Court, may prevent, hereafter, conflict between the states on the north side of the river and those on the south side.

In the history of the country, we have on several occasions, came near to war between states in relation to their boundary line— once between Michigan and Ohio, in reference to the northern boundary—once between Georgia and Alabama—and, on one occasion, between Ohio and Virginia. Heretofore, however, good sense has characterized the Courts and people, and though much excitement and feeling has arisen, we have had no very serious conflict beyond angry words. Yet it is not difficult to foresee that if the law in the Court below is to prevail, very serious conflict might grow up between these states. The Court of last resort in Kentucky, decided this very question in entire antagonism to the Supreme Court of Indiana upon the facts of this case; but it is easy enough to see that if it shall be determined by this Court contrary to the opinion of the Court of Appeals of Kentucky, in the case of *Speigleberg* v. *Sherley*, and that the laws of the United States

do not protect these owners from such liability, that that state well asserts its right to enact laws and create liabilities and punishment within her territorial limits. I know that Indiana claims to extend her laws over the whole river, and has convicted one person, at least, of murder, committed within the territorial limits of Kentucky. *Carlisle* v. *The State*, 32 *Ind.* 56.

It was done upon the theory that the compact before referred, authorized it, but I know of nothing like it any where else. In many of the acts admitting new states into the Union, the boundaries are the centre of the Wabash, the Mississippi and Missouri Rivers, and it has been declared to be the centre of the river, in the acts of Congress admitting them into the Union, and a provision has been made that upon the river so far as it is a common boundary, the opposite states should have concurrent jurisdiction. Thus, to as Iowa the 3rd Sec of the law admitting that state is in these words:

"And be it further enacted: that the said State of Iowa shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on said State of Iowa, so far as said rivers shall form a common boundary to the said state, and any other state or states, now, or hereafter to be formed or bounded by the same, such rivers to be common to both." 5 *Stat. at L.* 743.

The 2nd Section made the boundary line down the centre of the channel. 5 *Stat. at L.* 742.

In the case of *Ward* v. *The Mis. & Mo. R. R. Co.*, the District Court of Iowa, setting as a Circuit Court, entered a decree abating that part of the Rock Island bridge in Iowa.

This Court reversed the decree abating the part of the

Rock Island Bridge in Iowa, because the abating the bridge in Iowa destroyed the part in Illinois, and neither the Iowa Courts nor the Circuit Court of the United States setting in Iowa had power to do any act which affected the part of the bridge in Illinois.

The Court among other things say:

"The United States District Court holden in Iowa, exercised the same jurisdiction that a State Court of Iowa could have exercised and no more. It had no power beyond the middle of the river. On that part of the bridge within Iowa, and its piers, the Court below acted, and ordered that the structure should be removed." 2 *Black.* 493.

Further on the Court says:

"The District Court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much? These facts are beyond the Courts jurisdiction and powers of inquiry, and outside of the case." 2 *Black.* 494.

In that case the parties had carefully confined their abatement to the part of the bridge in Iowa, as that opened up a good navigable channel. The draw of the bridge left for passage of boats, was a few feet east of the centre of the river, and therefore in Illinois. As the bridge entirely stopped all navigation except at the draw, the evidence was largely upon the character of the draw, and to show that it could not safely be passed, and the last quotation relates to the large amount of evidence, showing many disasters in the draw.

The counsel of the complainant in that case confined the decree to the Iowa part of the bridge, for the reason that it

was at least very doubtful whether the Court could go beyond; and notwithstanding what the Court says in the opinion, gave proof by the maps and soundings, of a good boatable channel within the State of Iowa, relieved by this abatement. Indeed that was not disputed by any evidence in the case. This is known to one of the judges of this Court, who was counsel with the writer of this brief for the complainants. It might plausibly have been contended that a Court of the United States, in a case brought for the protection of the navigation, so carefully preserved in solemn treaties, and in the laws of Congress, might have gone further and abated the part of the bridge in Illinois, under the clause of concurrent jurisdiction. Even that would have been far within the claim set up by the plaintiffs below, and enforced in the judgment complained of.

The Court will observe that the Courts of Indiana in this case assumed the broad right of legislation over the river, under the compact. *Rec. p.* 265. They claim that this authorizes the state to create rights, fix penalties and punishment. They say among other things that:

"Whether one state can pass a law fixing the rights and liabilities for acts and conduct in another, does not arise in this case." *Rec. p.* 260.

Why does it not arise? It is because they hold that the compact makes the river a part of both states—that is the position taken. Why then could not an ejectment be tried in Indiana, for an Island south of low water mark, and what need of the long discussion of this Court in *Handley's Lessee* v, *Anthony*, 5 *Wheat.* 375 *to* 385, to show that the boundary line was above or below low water mark? And what is to prevent Indiana from legislating generally about nuisances and other

things on the river, and why the decision in *Ward* v. *The Miss. & Mo. R. R. Co.* under this same provision for concurrent jurisdiction. These statutory actions for wrongful conduct producing death, are just as local as actions of ejectment or the abatement of nuisances.

Vandever v. *M. G. & N. H. R. R. Co.*, 27 *Barb.* 246.
Woodford v. *U. S. & N. I. R. R. Co.*, 10 *Ohio St.* 123.
Campbell v. *Rogers*, 1 *Handy* 110, 111.

This language giving concurrent jurisdiction over the rivers to the state occupying the opposite banks, was I think borrowed from this Compact between Virginia and Kentucky, as that related to the free navigation of the river, and to the formation of states thereafter, from the territory bounding on it. I am not aware that any state but Indiana has ever given this language, any such broad construction as did the Supreme Court of Indiana in this case. They have confined it, to its evident purpose, the use and navigation of the river, the serving of process, attaching of property, arresting of criminals, &c., &c.

And we claim that the Supreme Court of Indiana erred to the prejudice of the plaintiff, in error upon this question, and that this Court must examine the questions arising under this second defense.

All of which is respectfully submitted.

T. D. LINCOLN,

Of Counsel for Plaintiffs in Error.

Kentucky Court of Appeals,

OCTOBER 4TH, 1871.

Andrew Speigelberg's Administrator,
v.
Zach. M. Sherley, &c.
} Appeal from the Jefferson County C. P.

The Court being sufficiently advised delivered the following opinion herein.

The steamboats United States and America, two of a line of packets plying between the cities of Louisville and Cincinnati, collided on the night of the 4th of December, 1868; and among others whose lives were lost, by the burning and sinking of the two boats, consequent upon the collision, was Adam Speigleberg.

This action was instituted by his widow and personal representatives, in the Jefferson Court of Common Pleas, against a portion of the owners of the two steamers, to recover "punitive damages for the destruction of her intestates life, she alleging that it was destroyed by and through the willful neglect of the servants and agents of the owners of said boats. Her alleged right to such recovery is based upon the 3d section of the act of March 10th, 1854, 2nd Stanton R. S. 510, which is in these words: "That if the life of any person is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss of the life aforesaid."

A demurrer to her petition having been over-ruled, Appellees answered; setting up three distinct grounds of defense:

1st. They denied that the collision of the two steamers was the result of willful neglect of their servants or agents.

2nd. They denied the jurisdiction of the State Tribunal.

3d. They pleaded in bar of the action, that the collision and the loss of life complained of occurred in the Ohio River, a public navigable stream within the jurisdiction of the United States, and navigable from the ocean by vessels of twenty tons burthen and upwards; that their two steamers were engaged in inter-state commerce; that they were constructed, furnished and equipped in exact conformity with the laws of Congress; were duly and regularly enrolled and licensed, and officered and manned, with licensed pilots and engineers, as required by said laws; that at the time of the collision the two vessels were under headway, and being controlled and navigated by regularly licensed pilots, who, in the management of them whilst running were not subject to the orders and control, either of the Appellees, or of the masters selected by them to command their vessels. Special demurrers to each paragraph of this answer were over-ruled, and a trial had, resulting in a verdict in favor of the defendants. A new trial was refused, and from the judgment founded on this verdict this appeal is prosecuted.

The principal grounds relied upon for a reversal, are alleged errors in the action of the court below, in giving and refusing instructions as to the proper criterion by which to determine whether or not the pilots were guilty of neglect of duty in failing to comply with certain rules prescribed by the federal laws for their government, when ascending and descending boats are about to pass. For reasons which shall hereafter be made apparent, we do not regard it necessary to review the rulings of the lower court touching this branch of the case.

The 3d paragraph of the answer was fully and clearly sustained by the evidence. The pilots at the wheel of each of the steamers were shown to be regularly licensed. The steamers were enrolled, licensed, officered and manned as required by law. The collision was the result of the action of the two pilots, for which, neither the appellees, nor any other of their officers or employees were either directly or indirectly responsible; such being the case, the questions become pertinent. Whether under such circumstances the owners can be held liable in damages for the injuries resulting to their passengers; and whether or not the statute of Kentucky can be made to apply to such a case as the one under consideration. The 8th section of the 1st article of the constitution of the United States, declares that Congress shall have power "to regulate commerce with

foreign nations, and among the several states, and with the Indian tribes."

The Supreme Court of the United States in the case of Gibbons vs. Ogden, 9th Wheaton, 196 speaking ot this grant power defines it to be "the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent; and acknowledges no limitations, other than are prescribed in the constitution."

In the celebrated Passenger Cases, 7 Howard, 401, Mr Justice McLean defines commerce to be not only "an exchange of commodities." but says that it includes navigation and intercourse; and that the transportation of passengers is a part of commerce; and this last proposition he holds to be so well settled that it is no longer an open question. In the late case of the Steamship Company vs. The Port Wardens the same court says, through Mr. Chief Justice Chase, that "the power to regulate commerce was given to Congress in comprehensive terms, and with the single exception of the power to lay duties on exports. And it was then given so far as it relates to commerce between the states, with the obvious intent to place commerce beyond interruption or embarrassment arising from the conflicting or hostile state regulations." 6th Wallace, 32.

It seems now to be the settled doctrine of the Federal Judiciary that the power of Congress to regulate commerce with foreign nations and among the states is exclusive. That the states reserved no powers which enable them to exercise jurisdiction over such commerce, concurrent with the general Government. In this doctrine the state courts have generally acquiesed, and the question may now be regarded as authoritively settled.

Some of the decisions as to the proper construction of this grant of power to Congress seems to be conflicting, but the apparent conflict grows out of the failure upon the part of the courts in some instances to define, with accuracy and precision, the exact principle intended to be settled. The states in the exercise of their reserved powers, have the undoubted right to enact and enforce laws, which may, to a greater or lesser degree, affect commerce. Among which are police regulations, health, quarantine, and inspection laws; laws regulating the internal trade of states, &c.; and the fact that such laws have been held constitutional by the federal as well as by the state tribunal, has induced some of the courts to speak of con-

current jurisdiction of the federal and state government over the subject of inter-state commerce.

The true distinction seems to be, that there is delegated to Congress by the federal constitution the right to regulate foreign and inter-state commerce, by laws operating directly upon the exchange of commodities," and upon "navigation and intercourse," but that the states, under their reserved powers, whilst they may affect commerce by the enforcement of police regulations, inspection, health and quarantine laws; by laws regulating their internal trade and such other laws as are for the general benefit, and go no further than to prescribe the manner of exercising individual rights within their respective territorial limits, cannot become the co-adjutors of the general Government, and undertake to supply what may be conceived to be defects in its legislation, by the exercise of a concurrent though subordinate jurisdiction.

It should also be borne in mind that when state laws though otherwise unobjectionable, come in conflict with any legitimate regulation of commerce made by Congress, such laws are of necessity inoperative. Cooley on Const. Limitation, 586 & 594.

The various acts of Congress relating to vessels carrying passengers, and propelled in whole or in part by steam, and employed on the bays, lakes and rivers, waters of the United States, beginning with the act of March 12th, 1812 and including those of July 7th, 1838, August 30th, 1850, and July 4th, 1864 are intended to, and do regulate, not only the construction and equipment of such vessels, but the manner in which they are to be navigated. The duties imposed upon the owners as well as the officers in charge of them, are specifically prescribed, and their respective rights, powers and responsibilities minutely defined

Such vessels before being used, must be inspected by the Government Inspectors, and the certificates of these inspectors must be hung up and kept in some conspicious place in the vessel; none but licensed engineers and pilots are to be employed or allowed to serve in the navigation of the vessel; and for a violation by the owners of any of these congressional regulations, heavy penalties are to be inflicted.

The act of August 30th, 1852 makes it "the duty of the supervising inspectors to establish certain rules and regulations to be observed by all such vessels in passing each other, as they shall, from time to time, deem necessary for safety. * *

* and should any pilot, engineer or master of any such vessel, neglect or willfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing, shall be liable to a fine of thirty dollars, and to all damages done to any passenger, in his person or baggage, by such neglect or refusal; and no such vessel shall be justified in coming in collision with another, if it can be avoided; "and it further provides, that" whenever damages is sustained by any passenger or his baggage from explosion, fire, collision, or other cause, the master and owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured, to the full amount of damage if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects, or imperfections of the steaming apparatus, or of the hull; and any person sustaining such loss or injury, through the carelessness or willful misconduct of an engineer or pilot, *or their refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot, and recover for any such injury caused as aforesaid, by any such engineer or pilot.*" Brightley's Digest Pages 857 and 858 and Section 56 and 57.

The same act makes it unlawful to employ an engineer or pilot who is not licensed by the Government Inspectors; (Ibid. pages 854, sec 34,) and such pilots and engineers are made *quasi* government officials, and required to take an oath that they will faithfully and honestly according to the best of their skill and judgment, perform the duties required of them by these laws. (Ibid 859, sec 65,) Considering the existing laws regulatiug the navigation of our public rivers by vessels carrying passengers, and propelled in whole or in part by steam, it seems to us that it is the manifest will of Congress, that whilst the owners shall be held liable for all injuries to passengers, resulting from any failure upon their part, or upon the part of the masters of their vessels, or of any other of their officers or employers, (except licensed engineers and pilots) to comply in good faith with the provisions of such laws in constructing, equipping, officering and manning them, or in navigating them, or from any known defects in the steaming apparatus or hull, or in other cases of like nature, that in that class of accidents resulting *solely* from the misconduct of, or negligence of those officers they are compelled to employ, who are in effect agents of the govern ment, and who in the navigation of the vessels when running, are not subject to the orders or control of the owners or masters,

no such liability is to exist. The 57th section *supra* by providing that the owners of the vessels shall be liable in damages in certain cases, and that the pilots and engineers shall themselves be responsible for injuries resulting from their carelessness, negligence or willful misconduct, or their refusal to obey the provisions of law, prescribing the manner in which they shall navigate the vessels committed to their control and management, indicates very clearly that the owners and masters were to be exempt from responsibility for accidents or injuries which the law had deprived them of all power to avert, unless they knew, or had reason to know, that their engineers or pilots though licensed, were either reckless, negligent, or incompetent, and still continued to employ them.

In this case it is complained that the loss of the intestate's life was the direct consequence of the willful neglect of the pilots of the two steamers to obey the rules and regulations prescribed by the supervising inspectors, for the government of vessels in passing each other.

The neglect in question, was that of officers whom the appellees were by law compelled to employ, and in the selection of which they were restricted to those persons whom the government had pronounced skillful, trustworthy and faithful; of officers who were governed in the discharge of their peculiar duties, by certain regulations prescribed by law, and who in the actual discharge of their duties were the superiors, and not the servants of their employees. The exemption of the owners of steamers from liability for the consequences of the neglect or misconduct of these agents of the government, is in accordance with the well established principles of the common law, that no person is to be held criminally or *civilly* responsible for the conduct of another, whom he cannot control, and who does not act as his representative. And further than this in our opinion, the Kentucky Statute, under which this action was prosecuted, does not admit of a construction violative of this principle, nor in conflict with the exemption in favor of the owners of steam vessels made by the Congressional enactments heretofore considered. Said Statute allows punitive damages only in cases of "willful neglect" by a person or persons, company or companies, corporation or corporations, their agent or servants. Punitive damages may be regarded as *tantamount* to "vindictive damages," "such as are given against a defendant who in addition to the trespass has been guilty of acts of outrage and wrong, which cannot

well be measured by compensation in money." 1st Bouvier Law Dictu. 361, L. & P. Railroad Co. *v.* Smith, 2nd Duvall, 559.

The enforcement of a judgment for such damages is in the nature of the infliction of a penalty.

By the common law such damages could only be awarded against the masters actually committing the acts of outrage or wrong.

By our Statute of 1854, they may in special cases be awarded against those whose agents or servants commit such acts. The Statute is penal in its nature, and as it provides for the enforcement of penalties against employers for the willful acts of their agents or servants, its application will be extended to no class of cases not clearly embraced by its term. It cannot and ought not to apply, and we feel assured that the Legislature did not intend that it should apply to employers, who are by law deprived of the right to select their agents or servants *untrammelled* by a superior will. Nor where the servant or agent when selected, is a quasi public officer not subject to the control or dominion of the employer. We conclude that the Statute in question, does not apply to this case, and that a judgment under it against the appellees, would have been unauthorized, even if the laws of Congress, regulating *inland* navigation did not under the facts presented by the record, interpose a bar to its enforcement.

We are also of opinion that the laws of Congress, fixing the liability of owners of passenger steamboats, navigating the public rivers of the United States, exempt them from responsibility for injuries resulting *solely* from the willful neglect or misconduct of licensed engineers and pilots.

They having in good faith made selection of such officers from the class set apart by the government inspectors, with the view to secure skillful, trustworthy and faithful men, and that even if the State law was intended to be applied to such cases, inasmuch as it would of necessity conflict with an express regulation of Congress upon the subject of interstate commerce, it would be to that extent inoperative.

From these conclusions it follows that no judgment in favor of appellant could have been sustained, hence she was not prejudiced by the action of the Court below in giving and refusing instructions. Upon the pleadings and evidence in the case the judgment is right. Wherefore it must be affirmed.

A Copy: Attest.

Supreme Court United States.

NO. 21[illegible]

THOMAS SHERLOCK et al, Plff's in Error.

vs.

CHARLES ALLING, Adm'r of Estate of OTIS B. SAPPINGTON, Dec'd, Def't in Error.

Supreme Court United States.

NO. 262.

THOMAS SHERLOCK et al., Plff's in Error,

vs.

CHARLES ALLING, Adm'r of Estate of OTIS B. SAPPINGTON, Dec'd, Def't in Error.

A writ of error from this Court to the Supreme Court of the State of Indiana has been obtained in this case.

The action in the State Court was for damages resulting from the death of Otis B. Sappington, and was founded on the following statute of Indiana:

"When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased."

2 G. & H., p. 330, sec. 784.

We think it desirable to ascertain what matters in the record are finally disposed of by the decision of the State Court, and what are open for examination in this Court. This can only be done by reference to the record and the code of practice in force in the State of Indiana. For convenient reference on this head, we give an abstract from the record:

Abstract.

The complaint of the plaintiff is in four paragraphs, stating the same cause of action somewhat differently. The complaint, by proper allegations, sets forth the negligence of the defendants, and, by proper allegations, shows that such negligence caused the death of Sappington, (the intestate.) Each paragraph of the complaint alleges that, by reason of such negligence, the steamers of the defendants (the United States and America, one descending and the other ascending the Ohio river,) collided *above low-water mark and within the county of Switzerland and State of Indiana, and that at said time, within said county and State, the deceased perished*, &c.

Printed Record, pp. 3, 7, 8, 11 and 12.

The defendants voluntarily appeared to said action, and filed nine paragraphs of answer, as follows:

Paragraph 1 alleges that the injuries complained of occurred on the Ohio river, and in the State of Kentucky, *and not in Indiana.*

Paragraph 2 is a repetition of the first, *with the addition of a plea of the statute of limitations of the State of Kentucky.*

Paragraph 3: That defendants were citizens of the United States, and that the colliding steamers were

built for them by citizens of the United States, and within the United States; that at the time of the alleged collision they were engaged in carrying on commerce between the States, bordering on the Ohio river, between Louisville, in the State of Kentucky, and Cincinnati, in the State of Ohio; that said steamers were licensed and enrolled by the United States Government, and had been regularly inspected; that the license, enrollment and inspection papers were in force at the time of the injuries complained of; that at said time said steamers had the necessary pilots, &c., and were duly equipped. Then follows, in said answer, the allegation that "the injuries did not occur in the State of Indiana."

Paragraph 4 does not contain any new matter, but is an *informal* denial of parts of the complaint.

Paragraph 5 is a general denial of the complaint.

Paragraphs 6 and 7: The first is in mitigation of damages. The second alleges the negligent *acts* occurred in the State of Kentucky, and that by the action of the current the steamer drifted, above low-water mark, into said county of Switzerland, where deceased perished.

Paragraph 8 is only a reiteration of previous paragraphs as to the place of injury, and the 9th paragraph is only a synopsis of the 4th. (*Vide* printed record, pp. 16, 17, 18 and 19.)

On motion, the Court struck out the *first*, *fourth* and *seventh* paragraphs of the answer and a *portion* of the 3d paragraph of the answer.

Printed Record, pp. 19, 20 and 21.

The motion involved no question on the merits, but

was dependent upon a question of pleading and practice under the code of the State. The general denial having been pleaded, all the matter set up in these answers was admissible under such denial; therefore, these answers were redundant in the record.

2 G. & H. Stat., p. 102, sec. 77.
Tousey *vs.* Bell, 23 Ind. R., 423.
Cohee *vs.* Cooper, 8 Blackford, p. 115.
Ross *vs.* Owen, 27 Ind., 167.

Our complaint charged the wrongs, &c., to have occurred in Switzerland county, in the State of Indiana. A denial put this and all other material allegations in issue, and the onus was on the plaintiff to establish a case within the statute.

The Court sustained demurrers to the 6th and 9th paragraphs of the answer, leaving in the record the 2d, 5th and 8th paragraphs of the answer.

Printed Record, pp. 20 and 21.

The plaintiff replied by denial, and also set up new matter.

The only questions that are presented in the record, we suppose, arise upon the demurrer to the 3d and 8th paragraphs of the answer. These questions are—

1st. Are the facts properly pleaded as required by the Indiana code?

2d. Does the fact that a steamer has been inspected, enrolled, licensed, &c., and has a licensed pilot and engineer on board, and the fact that it is American-built and owned and operated in commerce between States, by American citizens, in a proper case exempt the owners from liability under the statute of Indiana above

quoted? These we conceive to be the only questions in the case.

The license, enrollment, &c., were all given in evidence; were admitted by the Court below as having *a bearing* on the question of negligence.

Printed Record, pp. 179, 180, 181, 182, 183, 184, 185, 186, 187, 188.

We suppose, under the statute, this Court will determine whether one of the questions mentioned was presented to, and decided by, the Court against the right claimed by the plaintiffs in error under the constitution, treaties, laws or authority of the United States; or, whether such decision was necessary to the judgment.

We submit the right claimed by the plaintiffs in error was not properly and sufficiently presented in the Court below to make its decision subject to review on this writ of error, and therefore that it ought to be dismissed because this Court has no jurisdiction.

Farney *vs.* Towle, 1 Black, 350.
Messenger *vs.* Mason, 10 Wall., 507.
Maxwell *vs.* Newbold, 18 How., 511.

2d. That, if the case falls within the act, the Court must examine the judgment *so far as to* decide whether this claim of right was correctly adjudicated by the State Court; and, if correctly decided, this Court will affirm the judgment.

3d. But, if the claim was erroneously decided, then we suppose this Court will inquire, further, whether there is any other matter or issue adjudged by the State Court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be the case, the judgment will be

affirmed, without examination into the soundness of such other matter or issue.

Murdock *vs.* City of Memphis, 20 Wallace, p. 590.

The action was founded on a local statute of the State of Indiana, and, as a matter of course, the "place where" the wrongs were committed was a material part of the plaintiff's case upon the proofs with the issue presented by our answer of the general denial. The construction of the statute pertains to the State Court. The *locus in quo* was dependent upon conflicting evidence. The controverted facts on this point were as much for the jury as the questions of negligence, death and damages

The Statute of Indiana provides for specifically ascertaining any material fact by propounding interrogatories to the jury, and requiring an answer thereto, to be returned with the general verdict. The statute is as follows:

"In all actions, the jury, unless otherwise directed by the Court, may, in their discretion, render a general or special verdict; but the Court *shall*, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon *particular questions of fact*, to be stated in writing. This special finding is to be recorded with the verdict."

2 Gavin & Hord's Indiana Statutes, p. 205, sec. 336.

When the case was submitted to the jury, the plaintiff caused the following interro atories to be submitted to the jury, and they and the answers were properly returned, as follows:

"1st. Did the steamboats United States and America collide above or below low-water mark on the Indiana side of the river?

"Answer—Above low-water mark.

"2d. Did the United States sink and burn above low-water mark on the Indiana side of said river?

"Answer—She did.

"4th. Did Otis B. Sappington, deceased, perish and die on said steamer above low-water mark on the Indiana side of the river by reason of said collision and burning of said boat?

"Answer—Yes." * * * *

There were three other interrogatories and answers, but affecting no question presented. (*Vide* record, p. 255.)

These special findings of the jury under the Statutes of Indiana are a part of the verdict, and if they differ from a general verdict, control the latter.

Rice *vs.* Rice, 6 Ind. R., p. 100.

The above special findings render the opinion of the Court below on the question of concurrent jurisdiction a mere abstract question, because upon these findings the Court must have given a judgment for the plaintiff *on that question*, even if the Court had been of the opinion there was no concurrent jurisdiction between Indiana and Kentucky on the Ohio river, because the jury find that the collision, burning and death, caused by the negligence, all occurred above low-water mark on the Indiana side, and in Switzerland county in said State.

Case *supra* and Kennebeck R. *vs.* P. R., 14 Wall., 23.

The Court charged the jury that the territorial boundary of the State of Indiana on the southeast is low-water mark on the Indiana side of the Ohio river.

Printed Record, p. 249.

The question of jurisdiction over the subject matter, or cause or no cause of action, under the State Statute, was one for the State Court to determine *upon the evi-*

dence in the case, the pleadings showing jurisdiction as they do in this case.

It is a rule of the Supreme Court of Indiana, and of the lower courts of record, that where the Court has given substantially an instruction asked, either on its own motion or at the request of a party to the action, it is not error to refuse to give the other instruction asked. Many of the instructions prayed for by the defendants below should have been refused under this rule.

As to the exemption of the defendants from liability under the act of the Legislature of the State of Indiana, quoted *supra*, the plaintiffs in error rest their position upon the facts. 1st, that the action is given by a statute of the State, and did not exist at common law; 2d, that the States cannot impose new liabilities upon steamboats engaged in *lawful* commerce among the States, under the laws of the United States; 3d, that the power to regulate commerce is exclusively in Congress; 4th, that Congress has regulated commerce so far as it was thought wise it should be regulated; 5th, that the license to the defendants below frees them from the liabilty claimed.

We suppose all this may be resolved into the question whether the acts of Congress relating to the enrollment of steamboats, and to the fisheries and coasting trade, forbid, by any fair construction, the right to recover damages against the owners of such boats for wrongs or injuries caused by them in the careless navigation of said boats. We claim it makes no difference whether the action is founded on a statute of the State or on the common law; the reasoning of the learned counsel applies to either case. Does the license given by the act

of Congress give a right to the owners of the steamer to carelessly destroy life or limb, and leave the citizen of the State where the wrong is done without redress, except such as Congress may see fit to give? We think no such construction of the several acts of Congress, nor such claim to the exclusive power of Congress, can be sustained.

1st. We admit the right of action in this case did not exist at common law, and though we do not suppose it material to the decision of any question before the Court in this case, yet we may add the common law remedy referred to in the Act of Congress of 1789 is meant what the Constitution, in the third article, denominates "law"; not merely *suits* which the common law recognizes among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered, &c. The reference is to the form of proceedings and the remedies the Court has jurisdiction to give, and not to the origin of the cause of action.

It makes no difference whether the right of action is founded upon the unwritten or upon the written law; it is a common law action within the meaning of the Constitution and of said Act, and in these cases the common law courts of the States have jurisdiction. Even in admiralty the jurisdiction is concurrent except *in rem.*

1 Brightly's Digest, 24, sec. 1.
New J. S. N. Co. *vs.* Merchants' Bank, 6 How., p. 385.
Parsons *vs.* Bedford, 3 Peters' R., 447 of Opinion.
Parish *vs.* Ellis, 16 Peters, 452, 3 and 4, Opinion.
Steamboat Co. *vs.* Chase, 16 Wall., 522–530.

Baird vs. Daly 57 N.Y. Ct. Apps. 236
Dongan vs. Champlain Tr. Co. 56 Id. 1.

The objection that the State Statute gives a new remedy, will apply to all statutory rights of action, and cut off all municipal law except the unwritten.

The plaintiffs in error seem to admit that if death had not ensued, suit might have been brought. Why not, then, in this case? We do not think that the plaintiffs can give any substantial reason for a distinction between the cases.

2d. The Act does not impose any *new liability* on steamboats, &c., it does not attempt to give any remedy *in rem*, nor does it provide how steamers shall be navigated, manned or equipped The steamer is left under the rules and regulations as it finds them, and in case of an action brought against the owners, for a death resulting from a wrongful act or omission, as in other cases, it leaves the questions to be established by the rules of evidence, and from the facts establishes the personal liability of the owners, and not of the steamer. The law simply regards the question of negligence and death, and has no regard to the question, whether it occurred on a steamboat, a train of cars, on the public streets, or in a private house.

Congress has provided certain rules to be applied in the equipping, manning and navigating of steamers and certain duties to be observed by pilots, engineers, &c. These are by our law taken as binding, and, so far as they go, as stand-points, to ascertain, in a given case, if there has been negligence; and if so, whether it has created the liability contemplated by our statute. In this case, the inquiry was as to acts or omissions of the persons, and reference is had to the steamers as the *instruments* connected with said acts or omissions, as evi-

dence going back to charge the persons with a wrongful omission of duty, causing the death. The ownership of the steamers is established to create the relation of principal and agent between the plaintiffs in error and those in charge of the steamer at the time of the wrongs complained of. It is this *personal* relation that renders the plaintiffs in error liable.

Sturgis *vs.* Boyer *et al.*, 24 How., p. 110.
Story on Agency, 7 ed., p. 316.
E. & C. R. R. Co. *vs.* Baum, 26 Ind., 70.

If the Act had provided how a steamer should be navigated, and what class of persons should act as engineers, pilots, &c., &c., and what qualifications they should possess, and had provided for an action if death resulted from omitting any of such requirements, the case would be very different from the present one.

No burden by the State act is placed on the steamer; no interference with her navigation or control is attempted; the act does not single out those engaged in running steamers, but it stands just as the common law stands upon the subject of injury to persons by negligence—applicable alike to all persons incurring the liability, without regard to the particular pursuit in the prosecution of which the wrong may occur.

The laws of States giving rights of action and giving remedies may be enforced the same against steamboats as against other personal property. This applies to mesne and final process. Thus they are liable to attachment, to execution; are liable, as personal property, to be assessed and sold for State taxes. There is nothing in the fact that it is a steamer that makes the structure differ from other personal property. The restrictions

are to prevent a *direct interference* by law with the ordinary use of the boat as an instrument of commerce.

Taylor *vs.* Carryl, 20 How., 584.
3 Story's Com. on Const., sec 1,666.
2 Wheaton, 12.
Freeman *vs.* Howe, 24 How., 450.

The cases cited by counsel for plaintiffs in error upon the argument in the Supreme Court of Indiana are, we submit, not in point upon the question under consideration: 1st, they are cases either of a *direct* burden upon the instruments of commerce and the right to carry it on within the State; or, 2d, arise under State acts requiring a different registration and enrollment or specific burden there than provided by Congress as a condition of navigating the waters of the State or entering the ports thereof; or, 3d, under acts imposing tonnage duties; or, 4th, under acts imposing duties upon commerce for the purpose of raising State revenue; or, 5th, under statutes imposing a tax upon passengers arriving at the ports of the State, in contravention of treaties and in violation of the Federal Constitution, providing that no preference shall be given to the ports of one State over those of another—that a tax destroys the uniformity of duties, imposts and excises, &c.; or, 6th, to State acts authorizing obstructions to navigation to be erected over or in public waters.

The case of Hays *vs.* Pacific M. L. Co. was only a question of the status of a steamer as personal property for State taxation.

17 How. R., 599 and 600 of opinion.

A reference to the cases cited will verify the correctness of our statements:

The Passenger Cases, 7. How., 283.
Pennsylvania *vs.* Wheeling Bridge Co., 13 How. R., 518.
Green *vs.* Biddle, 8 Wheaton, 1.
Sinnot *vs.* Davenport, 22 How., 227.
Foster *vs.* Davenport, 22 How., 245.
Steamship Co. *vs.* Port Wardens, 6 Wall., 31.
State Tonnage Tax Cases, 12 Wall., 204.

These several acts had no application except a *direct* one, dependent on *commercial pursuits and navigation.* The several acts were repugnant to the express provisions of the Constitution of the United States or of the acts of Congress in force at the time, and clearly void. The Act in question is obnoxious to none of these provisions.

The plaintiffs in error made the point in the Court below that "*The power to regulate commerce is exclusive in Congress.*"

"Congress shall have power to * * * regulate commerce with foreign nations, among the several States, and with the Indian tribes; * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

We have already shown there is a distinction between a law of a State acting *directly* upon an instrument of commerce, or the right to carry it on, and a general law making all persons liable who cause death by negligence; and that the fact that a steamer is enrolled, inspected and licensed, and used in commercial pursuits, does not change its status as personal property; does not place it beyond State process for debts and liabilities of the owners, nor beyond the reach of State taxation; does not permit those navigating the steamer to commit crimes against the States; does not exempt the owner

from damages for injury done to property or person; and in all cases, including "marine torts," the States have jurisdiction against the owner of the steamer or vessel.

The effect of the constitutional provision as to regulating commerce (if it be necessary to consider it in this case) is not as exclusive as plaintiffs in error claim.

State Tax on R. W. Gross Receipts, 15 Wall., 284

It is no objection to distinct substantive powers that they may be exercised upon the same subject. The State may exercise concurrent or independent powers in all cases but *three;* viz: 1st, where the power is lodged exclusively in the Federal Constitution; 2d, where it is given to the United States, and *prohibited to the States;* 3d, where, from the nature and subject of the power, it must *necessarily* be exercised by the National Government *exclusively.*

Houston *vs.* Moore, 5 Wheaton 49, of opinion.
Gilman *vs.* Philadelphia, 3 Wall., 713 to 730.
3 Peters' R., 250.

The Constitution, containing a grant of powers in many instances similar to those already in the State governments, and some of these being of vital importance to State authority and State legislation, it is *not to be admitted* that a mere grant of such powers in affirmative terms to Congress, *per se*, transfers an exclusive sovereignty on such subjects to the latter.

Smith *vs.* Maryland, 18 How., 71.
Houston *vs.* Moore, 5 Wheaton, 49.
Fox *vs.* Ohio, 5 How., 410.
15 Wall., 284.
Moore *vs* Illinois, 14 How., 13.

Though the right to regulate commerce is given to

Congress, it is not in its nature a matter that prevents the States from passing laws even relating to commerce on such subjects as Congress has not specifically legislated upon.

Cooley's Const. Lim., 19, (side page.)

If any principle may be deduced from the decisions and opinions of that high tribunal, the United States Supreme Court, it is this, that each State may pass such laws affecting commerce, to operate within its own limits, not in conflict with the provisions of the Constitution of the United States or acts of Congress, as are necessary for the preservation of life, the health, the personal rights and property of its citizens, and of those enjoying its protection.

4 Sandford N. Y R., 492.
Mahler *vs.* Transportation Co., 35 N. Y., 352.
United States *vs.* Bevans, 3 Wheaton, 336.
Booth *vs.* Shepard's Adm., 8 Ohio St. R., 243.
15 Wallace, 284.

The Constitution confers a general power, and *contains no prohibition to the States;* and, unlike the provisions forbidding a tax upon tonnage of vessels, upon imports and exports, and the ordinance for free navigation, it leaves the matter under the power and control of Congress; but, until *specific legislation* is had upon the subject, the right still remains in the States to enact laws not conflicting.

15 Wall., 284.
Cooley *vs.* Port Wardens, 12 Wheaton, 318 and 319.
Steamship Co. *vs.* Joliff, 3 Wall., 450.
2 Parsons on Shipping, &c., 107.
3 Wall., 71, 3, 26.
21 Howard, 187.
2 Peters, *supra.*

The mere grant of such power, to regulate commerce, to Congress does not contain any terms which expressly exclude the States from exercising authority over its subject matter, and does not imply a prohibition.

Cooley *vs.* Port Wardens, 12 Wheat., pp. 318 and 319.
1 Woodbury & Minot, 420.
12 Peters, 72.
11 Peters, 102, 136, 155.
6 McLean's R., 237.
6 Wallace, 41 and 42.

Persons within the jurisdiction of a State are liable to its laws, both civil and criminal; and officers and seamen upon a vessel, the very agents of navigation, when within a State's jurisdiction, may be arrested in civil and criminal actions; and the vessel is also liable to execution.

City of N. Y. *vs.* Milin, 11 Peters, 140 and 141.
Smith *vs.* Maryland, 18 How., 71.

Commerce and its incidents, even by water navigation, include *incidents* and *interests* almost limitless. It seems impossible for any legislative power to specify all the duties and liabilities which may devolve upon those carrying on the same. It is an easy matter for Congress to provide for the licensing of pilots and engineers; to fix the steam pressure per square inch; to require the enrollment of vessels and steamers; to provide that for certain defects in machinery, if injury results, the employees, &c., shall be liable, &c., but it is impossible to provide for and specify all the injuries that may result from *negligence* of the employees in the discharge of their duties, and to describe them by *definition.* Indeed, if Congress were to attempt this, and assume to supply specifically all that the common law remedies and its

rules of evidence are capable of providing for, there would be such a failure of justice, and such a defect in the effort to protect the citizen, as would leave barren the jurisprudence of the country.

Indeed, we feel at liberty to express the opinion that if Congress, with its present legislation as to commerce, were to enact that no right of action should exist except those now provided by said body, and that all deaths, loss of property, or injuries to person caused, except those provided for, should be without remedy to the injured party, no matter how gross the negligence causing them, its enactment would be void; that the rights of person, property and life are superior to any act of Congress or the States, unless forfeited. This suggestion goes to the points made by plaintiffs in error, which seem to us dangerous. One cannot surrender life and limb to the negligence of pilots and engineers, and feel that he is protected as a citizen in his private rights.

The act of Congress relating to steamboats and penalties does not cover a moiety of the grounds of action that may arise against the *owners* of steamers; indeed, if the rights of action provided by Congress were limited to those named, it would *destroy* commerce.

But the question so far remains, What is a regulation of commerce? Surely it is not an act that is intended to protect life, limb, and property against the negligence of carriers for hire. The power in Congress to regulate commerce cannot interfere with the State laws giving damages for gross or other negligence; it cannot exempt those who own and navigate steamers from lia-

bility for assault and battery, theft or murder, committed by them on the steamers.

The State courts have always claimed the right, and exercised it, to pass laws for the protection of *life, health and property*, inspection laws, &c.

18 Alabama, 185.
7 Iredell, 321.
16 Ben. Monroe, 699.
18 Miss., 283.
14 Texas, 183.
31 Maine, 361.
18 Conn., 500.
4 Georgia, 525.
7 Shep., 353.
4 Rich., (S. C.) 286.

This subject is fully and ably discussed in the 16th chapter of Cooley's Constitutional Limitations.

Cooley Const. L., p. 572.

The plaintiffs in error assume the statute in this case *is a regulation of commerce*, (*which we deny*,) and make the point that Congress has legislated on the subject as far as it desires.

1. *Congress has not legislated upon the subject* and cause of action covered by the statute.

It has provided, among other matters, that injury may be sued for, by passengers, if it happens through any neglect to comply with any of the provisions of the act of Congress, *or any known* defects of the steamer's apparatus or hull. Also, against an engineer or pilot for damages caused by negligence.

The statute gives a remedy the State could not give, viz: the right to proceed *in personam* or *in rem*.

The right of action is only given for a violation of the provisions of *said act.*

The acts of Congress applicable to the points made in this case, or referred to by plaintiffs in error, will be found collected in volume 1 of Brightly's Digest, 848 to 859. They do not profess to provide a code of remedies, or limit the liabilities of the owners of steamboats for the carriage of passengers. The various titles are: 1st, "Registry, Licensing and Enrollment of Steamboats"; 2d, "Construction and Equipment of Steamboats"; 3d, "Construction of Boilers"; 4th, "Inspection of Steamboats"; 5th, "Landing of Steamboats"; 6th, "Navigation of Steamboats."

Under the last subdivision are general provisions, such as requiring safety-valves to be opened when the steamer is stopped; requiring signal-lights, &c. Such general rules are proper, but the act contains no terms of *exclusion*, nor does it *profess* to take away any right of action for private injuries.

Coke's 2 Inst., 200.
Dwarris' Stat's, 474.
2 Caine's N. Y., 169.
Hartford *vs.* Kennedy, 12 Conn, 499.
16 Peters' U. S. R, 342.
Lang *vs.* Scott, 1 Blackford (Ind.) R., 405.
23 N. Y., 552.

2. The section making an explosion of a boiler *prima facie* evidence of negligence, is only cumulative, and does not take away the right to prove negligence in fact, according to the ordinary rules of evidence.

47 N. Y. R., 282.

In different States of the Union, laws taken from the act of Parliament commonly called Lord Campbell's Act, and similar to the Indiana act, were in force, and, with a knowledge of such State laws, the various acts of Congress were passed; and also, at said times, Congress knew the State courts were enforcing remedies for injury to person and property against common carriers, by land and water; and if the object had been to provide an exclusive code of remedies by these various acts, it would have been so expessed, and ample provision would have been made for compensation. These acts of Congress are only cumulative; they are binding, but do not cut off the liabilities of owners, nor restrict such liability to the acts of omission or commission therein claimed to be negligent. These acts of Congress simply impose *additional* safeguards for the protection of passengers on steamboats to those *before* imposed by law, and to such as might thereafter be imposed, not in violation of the Federal Constitution or acts of Congress.

Crittenden *vs.* Wilson, 5 Cowen N. Y. R., 165.
4 Wendell, 670.
47 N. Y., *supra*.
48 N. Y., 209.

It seems to us apparent, from the various acts of Congress, the existing laws of the States, and the earlier legislation of Congress, that the object of the several acts of Congress referred to was to provide general rules affecting the instruments of navigation; that Congress did not intend to deprive the citizens of the States of rights of action arising from the wrongful acts of any class of persons; that the action brought by the defendant in error has nothing to do with the *substantive* subject mat-

ter of navigation. It is a private remedy, given by the State for a private injury to her citizens, (viz: the widow and children of the deceased.)

47 N. Y. and cases *supra*.

By any ordinary rule of interpretation, the State law and acts of Congress both stand in full force.

The People *vs.* Stephens, 3 Wend., 341.
22 N. Y., 198.
23 N Y R., 555.
Hartford *vs.* Kennedy, 12 Conn., 527.
Ex parte McNeil, 13 Wall., 236.
12 How. R. 312.

The Federal courts and State courts have regarded the acts giving a right of action in case of death by negligence highly remedial, and these statutes have been enforced by both Federal and State courts as remedies at common law.

Railway *vs.* Whitton, 13 Wall., 370.
Railroad Company *vs.* Barron, 5 Wall., 90.
Steamboat Co. *vs.* Chase, 16 Wall., 522.
Mahler *vs.* The Norwich, &c., Tr. Co., 35 N. Y., 352-360.
Booth *vs.* Hubbard 8 Ohio St., 243.
18 Ill., 349.
Penn. R. R. Co. *vs.* McCloskey, 23 Penn. St., 526.

In the case of R. R. Co. *vs.* Barron, 5 Wall., *supra*, the Court say: "The policy of the law was evidently to make common carriers more circumspect in regard to the lives entrusted to their care. They were responsible at common law if, through their fault, broken limbs were the result, but escaped responsibility if death was the result. To remedy this evil, and to provide a continuing responsibility, was the object of the law."

5 Wall., pp. 93-106.

It is hardly necessary to say that a class of cases cited by the plaintiffs in error in the Supreme Court of Indiana, relating to the State laws giving a right to proceed *in rem* against water craft, are not applicable here. Congress had given specific jurisdiction in such cases to the Admiralty Courts, and only reserved to the State Court concurrent jurisdiction *in personam*. We submit, then,—

1st. That the Indiana statute is not in any sense a *regulation* of commerce.

2d. That it does not conflict with any statute of the United States relating to inter-State commerce.

3d. That the acts of 1838 and 1852, referred to by plaintiffs in error, are not prohibitory or exclusive, but are cumulative, for greater safety of person and life.

In Steamboat Co. *vs.* Chase, (16 Wall., 522,) which was an action on a statute of Rhode Island similar in its provisions to the Indiana statute in question, the plaintiff in error, a common carrier, while navigating a steamer in Narragansett Bay, in tidal waters, negligently ran over one George Cook's sail-boat, and thereby caused his death. While the points relied upon by the plaintiff in error were not the same as those stated in this case, yet they involved the same principle.

1st. It was insisted that the injury was caused by a marine tort, for which an action was created by the statute of a State, and that, as Congress had legislated upon the subject of admiralty jurisdiction, and had not given such a right of action, the State courts and laws had no power or right to give or enforce such an action.

2d. That a suitor could not have a remedy in such

case in a common law court, even if the admiralty courts have jurisdiction, because the right of action was created by a State statute, enacted subsequent to the Judiciary Act.

The Court held that the fact that admiralty had no jurisdiction, left the State courts free to enforce the remedy against the owners of the steamer *in personam;* and further held, if admiralty had jurisdiction, yet the saving clause of the ninth section of the Judiciary Act gave the State court a right to proceed *in personam,* according to the forms of the common law. The Court held the act valid.

Ib., 533, 534.

We think it immaterial in this case whether an admiralty court had jurisdiction or not. That question is not settled.

Hiner *vs.* Sea Gull, 2 Law T., 15. 1 Sprague 522

57 Me. 248

We have heretofore said that the question as to whether the death was caused within the jurisdiction or territory of the State was *one of fact,* and that the verdict of the jury had settled that question; that the courts of the State must, as to *that* question, act upon the verdict, *and be controled by it.*

The place where the act was done was of necessity under the statute, and the construction given to it a part of the cause of action; and, with the finding of the jury before the Court, the decision and charge of the Court as to concurrent jurisdiction over the Ohio river, becomes, and is, an *abstract* question, and *immaterial* in this case.

Besides, it is not one of the questions mentioned in

the 25th section of the Judiciary Act as amended by the act of July 25th, 1867. It is not a federal question, and was not raised and presented to the court below as such. Therefore, this Court has no jurisdiction to examine it.

Murdock *vs.* Memphis, 20 Wall., 633.
French *vs.* Hay, 8 C. U. S., May term, 1875.

But, we submit that the State of Indiana has concurrent jurisdiction with the State of Kentucky over the Ohio river so far as it forms a common boundary to these States.

1st. Virginia, in 1789, was the proprietor of the territory comprising now the State of Kentucky, as well as the territory northwest of the Ohio river, and in 1789 ceded the territory of Kentucky in trust to the United States.

U. S. Stat's at Large, vol. 1, p. 189.

On the 18th of December, 1789, the General Assembly of Virginia passed an act relating to the erection of the district of Kentucky into an independent State. The 7th section of the act provided as follows:

"And the respective jurisdictions of this Commonwealth and of the proposed State on the river (Ohio) aforesaid shall be *concurrent* only with the States which may possess the opposite shores of the said river."

Revised Laws of Va., vol. 1, p. 59.

2d. In 1791, Congress, by an act, provided for the admission of Kentucky as a State into the Union, the preamble of which refers to the act of Virginia, and recognizes the right to admit the State by virtue of its provisions.

1 Brightly's Digest U. S. L., 445, sec. 1.

3d. In 1843, Indiana passed an act, entitled, "Of the Boundaries of the State, its Territorial Jurisdiction and Sovereignty," the second section of which provides that "the State possesses jurisdiction, &c., coextensive with the boundaries as declared in the first section, * * and has concurrent jurisdiction in criminal and civil cases with the State of Kentucky on the Ohio river * * so far as said river forms the common boundary between this State and the said State respectively";

(Revised Laws of Indiana, 1843, page 66, sec. 2,)

and in 1851 the same provisions were incorporated into the Constitution of Indiana.

1 Gavin & Hord's Stat's, p. 53.
Art. 14, Sec. 2, of Indiana Constitution.

In the case of Carlisle *vs.* the State, the Supreme Court of Indiana held that the Circuit Court of Spencer county had jurisdiction to try the defendant for murder committed on the Ohio river, *beyond* low-water mark, and opposite to said county.

32 Ind. R., p. 55.

Section 96 of 1 G. & H. Stat., p. 191, provides for the service of process issuing from the courts of the State on said river. These acts have been passed and constitutional provision adopted by authority of said act of Virginia. We think it needs no argument to show that Virginia had the power to impose this condition when she parted with the territory embraced in the act. Indiana has for years asserted her rights to this concurrent jurisdiction by constitutional provisions, by acts of the Legislature of the State, and by the decisions of her courts, and we are not aware that it has been seriously

questioned by any power, foreign or domestic.

35 N. Y. R., 352, 360.
1 G. & H. Stat's, 190, sec. 93.
1 G. & H. Stat's. p. 347, sec. 13.
Revised Laws, 1843, p. 347, sec. 20.
Laws of Ind., 1824, p. 211, sec. 13.

The general proposition that the laws of a State have no force outside its territorial limits, we do not question, but this by no means settles the question that a State cannot have jurisdiction over the soil owned by another State. We suppose, by compact, one sovereignty may enforce her laws within the territory of another, or exercise jurisdiction within specified limits. Supposed inconveniences arising from this state of affairs have nothing to do with the question if the *right* has been conferred; that ought to be the end of the matter.

Virginia having ceded the territory, and, by the act of cession, provided for such concurrent jurisdiction, and erecting a State out of such territory; the United States and Kentucky having accepted the cession, and the latter admitted into the Union as a State pursuant to such session, the act of Virginia becomes an irrevocable compact with the States to the northwest of the Ohio river whenever they desire to avail themselves of its provisions.

U. S. Const., art. 1, sec. 18.
Green *vs.* Biddle, 8 Wheaton, pp. 1 and 86.
13 How. U. S. R., pp. 518, 566.
Hadley's lessee, *vs.* Anthony, 5 Wheaton, p. 384 of opinion.

The reasons for, and wisdom of, such a provision are apparent. It was foreseen that sovereign and commercial States would in due time be established bordering on said river, on the northwest; that said river was nav-

igable for the purposes of commerce, and must become a thoroughfare for exportation from, and importation to, such States; that crimes would be committed, wrongs to person and property be done, along the borders of these States; that State laws would be passed which could only be enforced within the jurisdiction of the State. It is obvious that a limitation of the jurisdiction to *low-water mark* on the river must *often* leave the citizen and State authority in the condition of appealing to foreign tribunals for injuries done to person and property, and for the punishment of crimes, if done and committed below low-water mark, though affecting directly the commerce, dignity and interests of the State: that without such jurisdiction, the State would be deprived of the full benefits usually enjoyed by States from commerce upon their borders.

At common law, such actions as are not local could, of course, be brought in the State if the party could be found and served with process above low-water mark, (for we claim we either have full and complete jurisdiction on the merits, or none whatever, for service of process under the compact,) but crimes and many civil wrongs are local, and the remedies for violation of State statutes are also local; and, as to such, the State would have a commercial border without any adequate means of protection—a commerce which, in cases not included in the admiralty jurisdiction, would be dependent on the laws of another State for protection and material prosperity. Under the rights given by the compact, we have (as our constitution, by express provision, asserts) this "concurrent jurisdiction in civil and crim-

inal cases," with the State of Kentucky, on the Ohio river.

Const. of Indiana, art. 14, sec. 2.

The plaintiffs in error admit there is concurrent jurisdiction for the service of "mesne process," but no case has been found to sustain this limited view of the matter; and in the acts and compact there is no such restriction. Such a construction is a perversion of the plain language and import of the acts. The compact gives either what it purports to confer or is nugatory. Indeed, the concession that, under process from our State courts, steamers may be seized, (and of course subjected to adjudication,) and that criminals may be arrested on the river on final or mesne process, is to our minds a full answer to plaintiffs' position.

The unqualified term, *jurisdiction*, is used in the compact. What is meant by jurisdiction? We understand it to be, the authority by which judicial officers take cognizance of and decide causes. The cognizance would be fruitless without the power to decide.

3 Ohio, 394.
9 John. R., (N. Y.) 234.
3 Metcalf, (Mass. R.) 460.
1 Bouvier L. Dic., 14 ed., p. 769.

No injustice can arise from this concurrent jurisdiction. If two *forums* are open, the plaintiff has an election in which he will seek his remedy, though the practice, measure of damages, &c., may differ in the two; yet he may elect, and the defendant has no voice in the matter.

Stillman *vs.* Conn. Riv. Man'f. Co., 3 Woodbury & M., 538.

In this case the contract was to carry deceased to a

port in Indiana; he was a citizen of that State; letters were issued in that State; there were no assets in Kentucky, nor were any of the parties interested in said estate domiciled there. A second action could not be brought in Kentucky.

We suppose, where a concurrent jurisdiction exists between two States, an action brought under the laws of one is an *election*, and withdraws the subject matter from the laws of the other; and a final judgment in *one* is a bar to an action in the *other*, and, most certainly, a satisfaction of such judgment is the end of all controversy.

Story on Conflict of Laws, 6 ed., sec's 598 and 599. *d.*
Griswold *vs.* Pitcairn, 2 Conn., 85.
30 Va. R., 538.
16 Conn. R., 127.
Swift's Evi, pp. 9, 10.
5 Wall., 290.
Dunham *vs.* The People, 5 Ill. R., 172.
People *vs.* Warren, 1 Parker's (N. Y.) Cr. Cases, 338.
Nash *vs.* State, 2 Green (Iowa) R., 286.
26 Penn St., 513.
People *vs.* Dougherty, 7 Cal., 395.

We respectfully submit that the judgment of the Supreme Court of Indiana ought to be affirmed, with damages.

H. W. HARRINGTON
and
C. A. KORBLY,
For Def't in Error.